PhD dissertation

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Pandora's box?

Prohibition of Torture in a Comparative Analysis

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Recommendation for the Defence of the Dissertation Elaborated by JUDr. Rebecca Hassanová, PhD. and Entitled: "Pandorra's Box? Prohibition of Torture in a Comparative Analysis"

It is both a great pleasure and a sense of academic responsibility that I submit this evaluation of the PhD dissertation entitled *"Pandorra´s Box? The Prohibition of Torture in a Comparative Analysis."* This work that has been prepared by an exceptionally hard-working and capable PhD candidate, is an original dissertation presenting contribution to international legal scholarship. As a supervisor, I have prepared both: a scholarly peer review of the dissertation and a reflection on the supervisory experience.

The dissertation addresses one of the fundamental principles of modern international law, the absolute prohibition of torture, and does so with analytical depth and originality. While the prohibition itself is well-established, the dissertation goes beyond simply cataloguing legal sources or repeating existing standards. Instead, the candidate looks into how this prohibition really operates, how legal obligations are often avoided under the appearance of national security or exceptionalism or very specific, region-based interpretation.

The originality of the work lies in two spheres: first, in its integrated examination of jurisprudence, normative development, and geopolitical realities based on existence of regional legal framework and judicial decisions and second, in asking challenging questions, such as a hypothesis based on doubts about the prohibition of torture being a norm of *ius cogens* character. The candidate successfully examines complex legal regimes, expressly from the perspective of the prohibition of torture as fundamental human right. The aim includes also addressing emerging challenges, such as state practice in the context of counter-terrorism, extraordinary execution, or ecocide, making the work both contemporary and future-reflecting.

The dissertation is well-structured into two basic parts, the first one being the comparison of universal and regional human rights systems analysing the prohibition of torture and its enforcement, the second one focusing on current challenges when applying the prohibition of torture. Each chapter builds logically upon the previous one, moving from the foundational legal framework to critical assessments of enforcement of the prohibition of torture. The writing is clear, precise, and academically mature, with arguments presented in a balanced, evidence-based manner. The introductory chapter frames the research questions and hypothesis with clarity and defines the methodological approach appropriately, the concluding chapter synthesizes the findings and offers valuable recommendations.

An important strength of the thesis is the candidate's profound understanding of international jurisprudence. The legal reasoning is supported by extensive references to authoritative case law, including decisions from the European Court of Human Rights, the Inter-American Court/Commission of Human Rights, the African Court/Commission of Human Rights, the UN Human Rights Committee, and international criminal tribunals. The candidate demonstrates the ability to critically interpret and compare judgments and to reflect on inconsistencies or gaps between judicial rulings and state practice.

The discussion upon customary law and the identification of torture as a *ius cogens norm* are handled with deep interest and profound research. The candidate carefully explains the implications of this elevated normative status while acknowledging ongoing debates

concerning the scope of degrading treatment versus torture, and the slippery slope of legal justifications under “ticking time bomb” scenarios.
Moreover, the dissertation does not remain abstract or theoretical. It offers practical policy insights and recommendations on how international and domestic legal systems can more effectively prevent torture and ensure accountability. This includes reflections on e. g. the role of international monitoring mechanisms such as the Committee Against Torture and the Subcommittee on Prevention. The candidate’s thoughtful critique reflects a nuanced understanding of how legal norms are challenged in practice. The dissertation is thus not only academically rigorous but also committed to advancing human dignity.

As the academic supervisor of this dissertation, I would like to take this opportunity to highlight the working relationship I had with the PhD candidate over the course of the doctoral project.

I had known Rebecca already from her first PhD studies in Slovakia. From the very beginning, the candidate approached her research with a high degree of intellectual independence, professional discipline, and critical engagement. Our consultations were always constructive and collegial, Rebecca is highly competent and professional in her approach to work and has a very positive attitude. Her draft submissions were always of consistently high quality, reflecting thorough research, and good legal writing skills.

To conclude, the submitted dissertation represents an original contribution to the field of international law. It meets all the formal and substantive requirements for a doctoral thesis and exceeds them in many respects. The candidate has proven to be a highly capable and thoughtful academic. It is therefore with great confidence that I recommend the candidate be granted permission to proceed to the defence of her dissertation. Furthermore, I strongly support the award of the doctoral degree upon successful defence and encourage the candidate to publish her work in academic journals or as a scholarly monograph.

5 May 2025, Bratislava

ass. prof. JUDr. Katarína Šmigová, PhD.
supervisor

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List of used abbreviations

ACAT - Inter-American Convention on the Prevention and Punishment of Torture

ACHPR - African Charter on Human and Peoples' Rights

ACmHPR - African Commission on Human and Peoples' Rights

ASEAN - Association of Southeast Asian Nations

AU - African Union

CJEU - Court of Justice of the European Union

CoE - Council of Europe

ECHR- European Convention for the Protection of Human Rights and Fundamental Freedoms

ECtHR - European Court of Human Rights

GCC - Gulf Cooperation Council

HRC - Human Rights Committee

ICCPR - International Covenant on Civil and Political Rights

ICJ - International Court of Justice

IACHR - Inter-American Court of Human Rights

ILC - International Law Commission

OAS - Organization of American States

OIC - Organization of Islamic Cooperation

Robben Island Guidelines - Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa

SAARC - South Asian Association for Regional Cooperation

TEU - Treaty on European Union

UDHR - Universal Declaration of Human Rights

UN - United Nations

UNCAT - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

UNGA- United Nations General Assembly

UNHR- United Nations Human Rights Council

VCLT - Vienna Convention of the Law of Treaties

Introduction

The prohibition of torture stands as one of the most fundamental values in human rights discourse, yet it paradoxically generates more questions than definitive answers. Despite the widespread recognition of this rule, its application reveals significant inconsistencies and challenges across various regions and legal frameworks. The contrasting interpretations and enforcement of the prohibition of torture often highlight disparities in cultural, political, and legal attitudes, leading to a complex and multifaceted landscape that complicates the pursuit of universal justice and accountability.

The imperative to confront the reality of torture exposes fundamental dilemmas regarding state sovereignty, national security, and the protection of human rights. As governments grapple with the balance between safeguarding their citizens and adhering to international human rights norms, the question arises: how can states justify practices that appear to contravene their commitments to uphold fundamental rights? The ongoing debates surrounding the definition of torture, its categorization, and the contexts in which it may be utilized further underline the complexity of establishing a universally applicable prohibition.

Throughout history, evidence of torture can be traced back to ancient times, continuing through the Middle Ages and into the modern era, indicating that such practices have been consistently employed across various periods. During the Roman Empire, torture was extensively used against slaves and Christians. In the context of the Inquisition, it was inflicted on heretics and those accused of witchcraft, as well as on African slaves in the Americas. The torture methods of the medieval period have since been documented in history. Additionally, practices used by military forces to extract confessions of treason or to combat terrorism are widely recognized.[1] Consequently, torture has become a significant subject of scholarly discussion globally, with academics from Europe and America examining its implications within criminal and human rights law. The debates have raised critical questions regarding the definition of torture, its extent, legal framework, and societal acceptance.[2]

The prohibition of torture and ill-treatment is a core principle of the international human rights protection system and is integral to the constitutional framework of democratic

[1] Langbein, J.H. The Legal History of Torture. In Levinson, S.: *Torture: A Collection*. Oxford: Oxford University Press, 2004, p. 100.

[2] See Evans, M.D and Modvig, J. *Research Handbook on Torture: Legal and Medical Perspectives on Prohibition and Prevention*, Edward Elgar Publishing, 2020; Oette, L. *The Transformation of the Prohibition of Torture in International Law*, Oxford University Press, 2024; Lesch, M. *From Norm Violations to Norm Development: Deviance, International Institutions, and the Torture Prohibition*, International Studies Quarterly, Vol 67/3, 2023.

nations. Legislation offers wide protections against torture and ill-treatment at both international and national levels. However, as will be discussed, the criteria for defining torture have shifted alongside societal changes. Over time, legal standards and their enforcement have tightened, leading to a more intricate interpretation of what constitutes torture. The subsequent chapters of this research will focus on highlighting the key treaties and pertinent case law that form the basis of this protective framework.

The complex issue of the prohibition of torture reveals a landscape fraught with questions rather than definitive answers, underscoring the vast disparities in its acceptance and implementation across the globe. Despite being one of the most recognized and foundational human rights, the prohibition of torture demonstrates significant variations in interpretation and enforcement, reflecting profound cultural, legal, and political differences among regions. While jurisprudence around the prohibition is undoubtedly evolving, it often highlights stark contrasts in judicial attitudes and practices, raising concerns about inconsistencies in human rights protections. The prohibition as such, is generally understood as being one of the fundamental right of the international human rights protection. The impression hence leads to the thought that if there are such "issues" in this core right, it may doubt the overall effectiveness of the whole international human rights system itself. This raises critical inquiries: if such a fundamental norm can be undermined or ignored, what does that imply for the broader spectrum of human rights protections? Such skepticism may lead to broader implications regarding the effectiveness and universality of human rights principles, suggesting that any erosion of this fundamental norm could have far-reaching consequences for the integrity of human rights advocacy and enforcement worldwide. In essence, questioning the efficacy of the torture prohibition forces us to confront deeper concerns about the integrity and operational capacity of the human rights system as a whole, challenging the notion of universality and the commitment of states to uphold the rights and dignity of all individuals.

The dissertation presented here seeks to define several conceptual elements related to the prohibition of torture and ill-treatment. It also examines the obligations that states hold concerning the protection of fundamental rights against such abuses. This study offers a thorough investigation of the international legislative framework governing the prohibition of torture, addressing its nature, scope, and functions. The topic is closely tied to the broader context of human rights protection, which has been universally recognized since the aftermath of World War II.

The Universal Declaration of Human Rights[3] ("UDHR") stands out as a pivotal document in the realm of human rights. Through the UDHR, states pledged to work with the United Nations ("UN") to ensure respect for human rights and fundamental freedoms on a global scale. Although the UDHR was not initially enforceable, several articles evolved into customary law over time, and therefore are now considered binding.[4] The declaration is regarded as one of the most essential documents in human rights history, setting the stage for subsequent binding treaties like the European Convention on Human Rights[5] ("ECHR") and the Inter-American Convention on Human Rights.[6] In this context, Article 5 of the UDHR is also particularly noteworthy: *'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*[7] The provision has had a significant influence on later treaties and their provisions dealing with the prohibition of torture.

The prohibition of torture, inhumanity, degrading treatment, and punishment can be seen in numerous major international human rights law treaties and documents. At the UN level, torture is prohibited fundamentally by the: International Covenant on Civil and Political Rights (ICCPR) (Art. 7),[8] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("UNCAT"), and its Optional protocol. In the European regional human rights system we come across the European Convention on Human Rights, European Convention for the Prevention of Torture and when dealing with the European Union, the Charter of the European Union. At the Inter-American regional level apart from the American Convention on Human Rights, there is the Inter-American Convention to Prevent and Punish Torture.[9] The African regional human rights system established the prohibition of torture in the African Charter on Human and Peoples' Rights [10] and some non-

[3] Universal Declaration of Human Rights proclaimed by the United Nations General Assembly in Paris on 10 December 1948, GA resolution 217 A.
[4] Bantekas, I. and Oette, L. *International Human Rights Law and Practice*, Cambridge University Press, 2020, p. 67-68.; See Deplano, R. *Is the Universal Declaration of Human Rights Customary International Law? Evidence from an Empirical Study of US Case Law*, Stanford International Junior Faculty Forum, 2019.
[5] European Convention on Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, E.T.S. No. 005, entered into force 3 September 1953. More rights are granted by additional protocols to the Convention (Protocols 1 (E.T.S. No. 009), 4 (E.T.S. No. 046), 6 (E.T.S. No. 114), 7 (E.T.S. No. 117), 12 (E.T.S. No. 177), 13 (E.T.S. No. 187), 14 (C.E.T.S. No. 194), 15 (C.E.T.S. No. 213) and 16 (C.E.T.S. No. 214)).
[6] American Convention on Human Rights, opened for signature 22 November 1969, 1144 U.N.T.S. 123, entered into force 18 July 1978.
[7] Universal Declaration of Human Rights, 1948, Article 5.
[8] International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, entered into force 23 March 1976.
[9] Inter-American Convention to Prevent and Punish Torture, opened for signature on 9 December 1985, Organization of American States Treaty Series n. 67, entered into force 28 February 1987.
[10] African Charter on Human and Peoples' Rights ("Banjul Charter"), opened for signature 27 June 1981, Organization of African Unity n. CAB/LEG/67/3, entered into force 21 October 1986.

binding documents as the Robben Island Guidelines. Lastly, the Islamic regional human rights framework is attempting to set up the prohibition through the Arab Charter on Human Rights.

The provisions of the treaties mentioned earlier clearly articulate the *ius cogens* rule of the prohibition of torture, which is characterized by its absolute and non-derogable nature. The core of ius cogens stems in the natural law, which was introduced into the treaty form explicitly through Art. 53 and 64 of the Vienna Convention of the Law of Treaties („VCLT"). The VCLT refers to such norms, that have been broadly accepted and acknowledged by the international community of states as fundamental standards from which no derogation is permissible. In simpler terms, the concept of *ius cogens* norms is self-referential, as these norms are essentially defined by their very nature as *ius cogens*. This formulation highlights an important aspect: it is the collective perspective of states that ultimately shapes the identity and enforcement of these norms.[11] Additionally, the International Law Commission („ILC"), recognized that the defining characteristic of these norms as peremptory stems from the consistent practices and behaviors exhibited by states. Such practices not only reinforce the legitimacy of *ius cogens* norms but also play a crucial role in establishing their authority within the international legal framework. Hence, the process by which these norms are acknowledged and reinforced is dynamic, rooted in the ongoing interactions and shared values among states within the global community.[12]

The notion of the prohibition of torture as a *ius cogens* norm was first explicitly established in the Furundžija case by the International Criminal Tribunal for the former Yugoslavia. [13] Being one of the most widely recognized human right, this prohibition is integral to general international law, leading to *erga omnes* obligations.[14] These obligations represent specific duties that states have toward one another. The term *"erga omnes,"* derived from Latin, translates to *"in relation to everyone."* Such rules allow international courts, including the International Court of Justice ("ICJ"), the European Court of Human Rights (ECtHR), and the International Criminal Court ("ICC"), to extend beyond the traditional rights and responsibilities that arise from bilateral or multilateral treaties or international customs. This approach helps evolve international law by establishing standards based on natural law. Consequently, these obligations do not necessitate explicit consent from states to be considered bound by the rules they accept. Therefore, the prohibition of torture is a

[11] Shelton, D. *Jus Cogens,* Oxford University Press, 2021, p. 16.
[12] Report of the International Law Commission on the work of the second part of its 17th ses., No. UN Doc. A/6309/Rev.1, 1966, para. 247.
[13] ICTY, Prosecutor v Anto Furundžija, Case No. IT-95-17/1-T, Trial Judgement, 10 December 1998, para. 144.
[14] See de Wet, E. Jus Cogens and Obligations Erga Omnes. In Shelton, D.: *Oxford Handbook on Human Rights*, Oxford: Oxford University Press, 2013.

fundamental human right that every state and entity subject to international law must uphold, regardless of whether they have signed or ratified any treaty containing such a provision. [15]

Generally speaking, individuals with restricted personal freedom who are under the control of an authority are at a greater risk compared to others. Addressing these circumstances is essential, especially given the recurring instances of involuntary disappearances, where individuals are subjected to severe threats against their physical well-being. The traditional international human rights framework concerning torture asserts that the perpetrator of acts classified as ill-treatment must be a state official or someone performing a public duty. Since these officials are typically not directly engaged in acts of mistreatment within private contexts, the link between the state and the individual committing the act is established by the knowledge, actual or constructive, that the official had regarding the act, coupled with their inaction to prevent it. Thus, the state holds both preventive and punitive obligations to guard against torture and ill-treatment. These obligations specifically involve enacting normative measures to enforce the prohibition of torture within the legal system, ensuring that legal standards are upheld in situations where there is potential for harm, and implementing procedural measures to conduct thorough investigations and impose appropriate sanctions for any violations.[16]

The work at hand is focused on the international human rights perspective, which places a strong emphasis on the responsibility of states to prevent torture, ensuring accountability for perpetrators, providing support and rehabilitation for victims, as well as underlining the collective obligation of the international community to uphold and protect this fundamental right. Via such point of view the reader will observe the prohibition of torture through the lenses of universal human rights law and the specific regional human rights. The comparism of these systems aims to present different understanding and interpretation of the notion. Hence, the work comprehensively analyzes the freedom from torture from international point of view including questioning its fundamental nature.

An international legislative framework had been universally established, which should have been followed by effective enforcement measures. Nonetheless, also a monitoring mechanism has been established, there are evident issues with the effective adequate oversight of proper enforcement and prevention. Numerous countries still utilize torture as a method for interrogation or punishment, disregarding the requirements outlined in binding

[15] Nuhija, B. and Memeti,A. *The Concept of Erga Omnes Obligations in International Law*, New Balkan Politics, Vol. 2013/14, 2013, p. 31.
[16] Savnidze, E. *Effective Investigation of Ill-treatment: Guidelines on European standards*, Council of Europe Publishing, 2014, p. 113.

agreements. It is crucial to recognize that even nations regarded as democratic and advanced, such as the United States of America, has on the one hand ratified treaties prohibiting torture but on the other has recorded instances of torturing accused individuals. These governments often attempt to rationalize their practices by asserting that exceptions are necessary to safeguard national security.[17] Consequently, one might conclude that the existing implications of the torture prohibition are insufficient, highlighting the need for broader measures to address this issue. Hence, it is declared, that in the light of the (in)effectivity of the framework set up with regard to torture, it is more proper to call the phenomena as torture, which is often persecuted, as you can see from the title of the work at hand. Since, unfortunately, we cannot state without hesitation that there is an effective general prohibition of torture, even though the scholarly works use the term "prohibition of torture". In the following text, the aim is to provide an analysis of the international legislative framework for the torture and its persecution in each regional human rights system, considering these inadequacies. Additionally, the research will be analysing current issues, which are part of the academic discussion, such as the responsibility of corporate entities for human rights violations or the grasping after the notions of torture in the modern climate litigation. The choice of case-law is based on its importance and interpretative clarity in presenting the notion of torture in relation to the analysed conventions.[18]

[17] See Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment by Melzer, N, No. A/76/168, 2021.
[18] Hassanová, R.L. *The Prohibition of Torture and its Implications in the European Legal Sphere*, Central European Journal of Comparative Law, Volume IV, 2023/1, p. 54.

Methodology of research

There are many substantive problems within the field of human rights, and the importance of this legal area is without a doubt essential for the development of society. This is also evidenced by the fact that various experts and scholars have addressed the issue in the past. The thesis focuses on the in-depth examination of the issue of prohibition of torture, understood generally as being part of the *ius cogens* international law framework. The mantra of scholars stipulates, that the prohibition is universally accepted, i.e. the norm enjoys absolute and binding nature worldwide. The universal and regional human rights frameworks support such understanding. Nevertheless, after investigation of the practice, several questions arose. Some State agents did blur the strict and relatively wide interpretation of the prohibition, when in the name of "high-minded" ideas they started to relativize the peremptory norm. In the name of protection of the rights of "our people" some democratic states started the re-interpretation of the prohibition of torture.[19] Not to mention those regions, which are the blind-spots of the human rights framework, where the States will overrule any universal protection we know as human rights.[20]

The arbitrary application of the prohibition of torture is in theory absolutely banned. However, the practice uses its own methods how to interpret what the prohibition means and includes. The reasons for this are various, nonetheless the root cause may be seen in gaps which are allowed by the definition of the prohibition. Even though not all regional human rights frameworks are effective or practically existent, the universal protection enshrined in the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("UNCAT") enjoys quite wide number of ratifications.[21] Nevertheless, the definition included in the UNCAT may be easily misinterpreted, as will be analysed. Thus, States have the possibility to abuse the aim of the prohibition and to contemplate on ethics, legality and application of torture. All with the aim to somehow justify exceptions from its peremptory nature.

The fight against torture is definitely not new. Some governments have no barriers in using any means for keeping power. Yet the topic has gone from the shadows of closed environments to political, expert and sometimes even to public debates discussing what is

[19] See Ramsay, M. Can the Torture of Terrorist Suspects Be Justified? International Journal of Human Rights, Vol. 10/2, 2006.
[20] See Satterthwaite, M. The Story of El-Masri v. Tenet: Human Rights and Humanitarian Law in the „War on Terror", New York University Public Law and Legal Theory Working Papers, N. 15, 2008.
[21] As of April 2025 the UNCAT has 174 state parties.

morality and what shall be non-derogable in any circumstance. The abuse of the legal gaps by modern countries is more actual than ever. These countries claim that some "unethical" measures are necessary to protect citizens. The attempts to interpret what constitutes torture and how it can be justified, are generally undermining the absolute character of the norm.[22]

It seems as if the European human rights platform actively seeked to address these "current trends" by its jurisprudence, which has recently enhanced not only the traditional forms of torture but more and more the evolving methods and practices that may not have been explicitly defined in earlier legal provisions. This widening of the scope reflects an understanding of the changing dynamics of human rights abuses, particularly in the context of modern conflicts, state-sponsored violence, and the rise of oppressive regimes. The ECtHR has made it clear that the absolute prohibition of torture, enshrined in Article 3 of the ECHR, is a non-derogable right. This means that it demands from its member states a strict interpretation. Even in extraordinary circumstances, such as war or national emergency, states of the Council of Europe cannot justify torture or inhumane treatment. The ECtHR has however frequently widened and widened the understanding. It has come to the perception which includes even threats as violations of the mentioned article.[23] Nevertheless, some scholars, including the author, claim that such almost "unlimited" widening of the understanding of prohibition does not lead to strentgthening of the norm. On the contrary, making the threat of torture stronger than the life of nation, can have opposite effect, derogating from the initial right which protected from the most hideous acts.

The research of the dissertation will address these questions and demonstrate numerous issues which specify the complexity of the prohibition. The work will be using different methods of research. The whole work is divided into two main parts: A) general, which is focused on the the legislative basis of the prohibition and B) specific, which is observing certain specific issues, which are influencing the current practice. Each of the parts will be using the methods of analysis and synthesis when scrutinizing the main legislative binding and non-binding documents. The text will first deal with the universal human rights framework established by the United Nations. Furthermore, it will analyse the most important regional human rights frameworks (European, Inter-American and African). Consequently, the dissertation includes methods of comparism of each regional systems and their specificities. This comparative approach examines the strengths and weaknesses of anti-

[22] E.g. USA, Israel or France. See Posner, E. A. And Vermeule, A. Should Coercive Interroghation Be Legal? Public Law and Legal Theory Working Papers, No. 84, 2005.
[23] ECtHR, Gäfgen v. Germany, Application No. 22978/05, Judgement, 1 June 2010.

torture laws while scrutinizing the enforcement mechanisms that different jurisdictions employ to ensure accountability regarding torture. The second part will apply the knowledge from the first part and investigate each systems with regard to special questions, such as corporate law, environmental law or asylum law.

The scope of treaties and their framework which incorporate the prohibition in their texts is without a doubt enormous. Consequently, the author has intentionally omitted the analysis of some of these documents (International Convention for the Protection of All Persons from Enforced Disappearance or the documents of the Organization for Security and Cooperation in Europe), in order to ensure clarity and coherence. Given the complexity and volume of material related to the topic of torture, it became essential to prioritize certain treaties that offered the most significant insights and contributions to the discourse on international human rights. Including a broader spectrum of treaties would have required a more extensive examination, which could have potentially diluted the depth of analysis and the strength of the main arguments.

The work aims to bridge the existing treaty framework with numerous already mentioned practical problems. More specifically, the work, through synthesis, creates a bridge between academic theory, created in academic circles, and its practical appliion by States. The aim of the work is to use different scientific methods to competently and exhaustively process the issue. Accordingly, the work will enhance various methodological practices aiming to provide a comprehensive overview of the right known as prohibition of torture.

Theoretical background of the research

The methodology for the dissertation adopts a qualitative, interdisciplinary approach to explore the complex legal, political, and social mechanisms underpinning the prohibition of torture within both international and regional human rights contexts. This research aims to address primary research questions by analysing key international legal instruments that prohibit torture, the ways in which regional human rights frameworks complement or conflict with international standards regarding torture prohibition and the challenges faced in enforcing these prohibitive norms at both international and regional levels.

To achieve this, the dissertation employs a combination of data collection methods, including the analysis of primary and secondary sources. Primary sources consist of critical analysis of legal documents, treaties, and case-law related to the prohibition of torture. Key international instruments analyzed include the already mentioned UNCAT and the

International Covenant on Civil and Political Rights („ICCPR“).[24] On the regional level, the research considers instruments such as the European Convention on Human Rights („ECHR“), the Inter-American Convention to Prevent and Punish Torture, and the African Charter on Human and Peoples' Rights. These documents will be scrutinized for their provisions, defining the scope of prohibitions, the obligations placed on states, and the mechanisms established for enforcement. Complementing this analysis, secondary sources will be extensively utilized, including academic literature, reports from human rights organizations, and critiques relating to the practice of torture. Additionally, for a compehensive overview the work will entail the analyzis of the jurisprudence of the most influential regional human rights courts. The author will analyze their compliance with international and regional standards and assess the effectiveness of legal frameworks designed to address torture.

Main research hypothesis

When analyzing and evaluating the subject of research, based on the opinions presented and knowledge already acquired, the dissertation will be guided by the following hypotheses:

1. The definition of torture, as defined and applied by the UNCAT causes confusion and leaves room for such national implementation which may defeat its purpose.
2. The prohibition of torture is undermined to the level that the prohibition of torture can no longer be understood as part of *ius cogens*.[25]
3. The European regional human rights framework attempts to fight the „current trends“ of reinterpretation, by widening the scope of the prohibition in the region, and thus negatively influencing its universal acceptance.

The above hypotheses represent general hypotheses. Working hypotheses and their indicators will be developed after a deeper analysis in individual parts of the dissertation.

[24] It is necessary to mention here, that the work of the bodies of these treaties, i.e. Committee Against Torture and Human Rights Committee, although have an impact on the interpretation of the prohibition as such, nonetheless, still create only non-binding documents.
[25] Taken into account that the prohibition has to be universally accepted and recognized in order to comprehend it as having *ius cogens* nature.

I. Torture under the International - United Nations - Framework

Prohibition of torture is part of the international *ius cogens*, i.e. international law having absolute character. The universal prohibition, included in the customary law is not especially precise or well-defined, since it is observed as a result of a universal consensus and not as a result of a planned drafting process. The vagueness of the customary norms is common, however not always observed as a drawback. More so the character of customary law, can widen the scope of a norm with a certain level of flexibility, when interpreted. The general ban on torture is therefore lacking a firm customary foundation, not to mention, that the customary law requires a strong element of *usus,* which can be questionable since too many countries still engage in torture.[26]

Nevertheless, the notion of torture is included in numerous international treaties having binding nature. These treaties, although using the term of torture, generally lack the definition of torture. The definition itself is however present in the first article of the UNCAT. The definition stipulates certain elementary aspects which have to be fulfilled in order for an act to be understood as torture. These aspects include severe pain or suffering, either physical or mental, which is inflicted intentionally with a purpose, including the consent or acquiescence of a public official.[27] The analysis of these elements, however give rise to diverse questions.

On the first glance severe pain or suffering seems as an element which can be easily proved. Still, can we exactly define the minimum level of physical or mental abuse, which constitutes torture? Certainly, the imposition of any discomfort cannot satisfy the definition, since serving prison sentence or being subjected to a legal interrogation involves physical discomfort and even a considerable degree of pain. Demanding the suspect to sit still and face various questions can seem as fulfilling a level of discomfort, but such actions cannot be enough to satisfy the amount of pain which is necessary to be considered as one of the illicit treatment forms, such as inhuman or degrading treatment.[28]

The notion of the prohibition of torture is generally constituted out of three separate subnotions, such as degrading treatment, inhuman treatment and torture itself. The acts are divided from the least severe degrading treatment to the most intruding form of torture. However, it is not explicitly explained in the written treaties how one draws the line between

[26] Perry, J.T. *States of Torture*, Tennessee Law Review. Vol 84/3, 2016, p. 652.
[27] Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, U.N.T.S. 1465, entered into force 26 June 1987.
[28] Strauss, M. *Torture*, New York Law School Law Review, Vol. 48, 2003, p. 211.

extreme and lesser forms of cruelty. The distinction can be seen only from the interpretation of international courts present in their jurisprudence.

The notion of the prohibition, enhances variety of ambiguities resulting in debates concerning the applicability issues. The scholarly discussion related to the interpretation of torture were intensively present mainly after September 11, 2001 terrorist attacks in the USA. Lawyers, politicians and even the wider society were taking part and openly discussing the possibility of using coercive interrogation techniques.[29] The discussion opened the topic of a "reasonable" torture in certain extraordinary situations. These gained the name *ticking bomb* situations, where torture would not be seen as generally forbidden. The reasoning for these acts rested upon the hypothesis, that since it is necessary, some level of illicit treatment is legal and accepted in order to protect the lives of people.[30]

The US Department of Justice started preparing documents, that authorized various methods of coercive interrogation in circumstances where the detained is suspected of having information regarding future and even past terrorist activities. In this matter the question arises how can coercive interrogation be used for gaining knowledge regarding past events if the *raison d'etre* of the ticking bomb exceptions is to save lives.[31] Even though there were several negative reactions, the memoranda enabled to use mentally and physically violent interrogation tactics as part of a military and counter terrorists operations.[32] The result of the legislative actions were the creations of the Guantanamo Bay detention camp using questionable methods as part of the War on Terror operation started by the Bush administration.[33] In spring of 2004 the Abu Ghraib scandal broke out in the media broadcasting pictures of American soldiers abusing Iraqi prisoners. Consequently, the Department of Defense created a new manual on interrogation, that explicitly banned numerous coercive methods of the last years. Nevertheless, the infamous Guantanamo Bay still operates until today, despite the promises of the following Obama administration.[34]

The above analyzed situation in the USA represents an example how international human rights, and even the peremptory norm of the prohibition of torture can be subject to

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[29] Alter, J. *Time to Think About Torture*, Newsweek, 2001, [online], Available at: https://www.newsweek.com/time-think-about-torture-149445 (accessed: 02.03.2025).
[30] See Žižek, S., *Welcome to the Desert of the Real!,* The South Atlantic Quarterly, Vol. 101/2, 2002.
[31] See Elshtain, J. B. Reflections on the Problem of 'Dirty Hands,". In Levinson, S.ed.: *Torture: A Collection 77*, Vol. 87, rev. ed. 2006.
[32] The Office of Legal Counsel memoranda from 2002, as well as those from 2004 and 2005. In Cole, D.ed. *The Torture Memos,* 2009.
[33] Parry, J.T., *Understanding Torture: Law, Violence, and Political Identity*, University of Michigan Press, 2010, p. 199.
[34] Roth,K. *Barack Obama's Shaky Legacy on Human Rights*, Foreign Policy, 2017, [online], Available at: http://foreignpolicy.com/2017/01/04/barack-obamas-shakylegacy-on-human-rights/ (accessed: 02.03.2025).

different interpretation. The real character of the notion is therefore still vague, giving rise to doubts and purposive interpretation. The examination of the term is thus in place however, also tricky.

1.1. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

UNCAT Art. 1‘*"Torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.’*[35]

The UNCAT was adopted in 1984, following extensive discussions influenced by the perspectives of Jean-Jacques Gautier, a Swiss lawyer and banker as well as the founder of the Association for the Prevention of Torture. Gautier emphasized the need for enhancements to the text to facilitate states' compliance with the legal obligations derived from it, which were perceived as overly complex and controversial, leading to their deliberate omission from the final draft. The implementation of the Convention was entrusted to the Committee against Torture, a body composed of independent experts the first ten having responsibility to ratify the text.[36] The UNCAT is structured into a preamble and three principal sections. The first section addresses substantive law, providing the definition of torture in the initial article and establishing the principle of universal criminal jurisdiction over acts of torture. The second section pertains to various mechanisms for implementation. Within this section, the UNCAT establishes the Committee against Torture under Articles 17 and 24, which has the responsibility of monitoring compliance with the UNCAT among the signatory states. This Committee not only ensures that national legislation is adapted to align with the UNCAT's requirements but also oversees the effective enforcement of these legal provisions. Composed

[35] Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, U.N.T.S. 1465, entered into force 26 June 1987.
[36] Evans, M.D. and Haenni-Dale, C. *Preventing Torture? The Development of the Optional Protocol to the UN Convention Against Torture*, Human Rights Law Review, Vol. 4/1, 2004, p. 24.

of ten independent experts, the Committee reviews reports submitted by state parties and is also empowered to examine issues *ex officio*. The members convene regularly in Geneva for two sessions each year, one typically in April or May and another in November. The Committee collects credible information regarding states' practices related to ill-treatment, which may lead to confidential proceedings. Nevertheless, the observations made by the Committee take the form of findings, general comments, manuals, or guidelines, unfortunately none of these have a binding character.[37] However, the Committee does possess the ability to include its findings in its annual report to the UN General Assembly, which can result in various actions. The third section of the UNCAT addresses provisions related to the lifespan of the document, including clauses on ratification, amendments, and stipulations for its entry into force.[38]

Under the provisions of the UNCAT, the prohibition of torture is recognized as an absolute right that cannot be compromised or overridden by the need to protect other rights specified within the Convention. This means that no exceptional circumstances, including situations such as a state of war, the threat of imminent conflict, or internal political turmoil, can justify acts of ill-treatment. Additionally, the principle that a superior order does not absolve an individual from liability further reinforces the notion that accountability remains paramount regardless of the directives given by higher authorities. This critical legal obligation to prevent torture is clearly articulated in Art. 2(1) of the UNCAT, which mandates that states must take effective measures to safeguard individuals from torture. This provision underscores the commitment to uphold human dignity and reinforces the significance of combating and preventing torture in all contexts.[39]

According to the Convention, torture is explicitly defined as a deliberate crime, it requires that severe pain or suffering be inflicted as a direct consequence of the act, and it necessitates that the individual perpetrating the act is acting in an official capacity as a representative of public authority. To categorize specific actions as torture under the UNCAT, four fundamental elements must be satisfied. The first element pertains to the nature of the act itself, which includes both positive actions and omissions that result in significant pain or

[37] Fact Sheet Combating Torture. No. 04 of the United Nations Committee Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, 2002, p. 11.
[38] Coccia, M. *Forum: The GDR Declaration on the Un Convention against Torture. A Controversial Declaration on the U.N. Convention Against Torture*, European Journal of International Law, Vol. 1/1, 1990, p. 316.; Derckx.V. et. al, *Implementing the Torture Convention: protecting human dignity and integrity in healthcare*, Groningen: SN, 2013, p. 8.
[39] Article 2. (1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment reads as follows: *"Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."*

suffering for the victim. In accordance with international case law, the infliction of pain can encompass both physical and psychological dimensions.[40] The second element highlights the subjective aspect, specifically the intention of the perpetrator, who must aim to deliberately cause harm. This means that negligence or unintentional actions are excluded from the definition of torture. The third element emphasizes that there must be a specific purpose behind the action when it is carried out. Common motivations include the extraction of confessions, obtaining information, punishment, intimidation, coercion, or discrimination. However, Art. 1 of the UNCAT notes that this list is not exhaustive, allowing for the possibility of additional purposes that could also qualify as torture. The final element addresses the involvement of public officials in the act. While this criterion is typically straightforward, complexities can arise when considering a third party who acts in an official capacity. An illustrative example is found in the HMHI case,[41] where the Committee on Civil and Political Rights acknowledged a Somali clan as a non-state entity that exercised authority over a specific territory, thus fulfilling the role of *de facto* authority with responsibilities akin to those of public officials. Nonetheless, the Committee emphasized that each situation must be evaluated on an individual basis. Similarly, challenges may arise when prohibited acts are committed not by an official but rather with their consent or acquiescence, further complicating the application of the torture definition.[42]

The text of the UNCAT does not provide a clear definition of what constitutes cruel, inhuman, or degrading treatment or punishment. Reflections from the leaders of the drafting committee reveal that the codifiers encountered two fundamental challenges while developing the document. Firstly, while the concept of torture was relatively straightforward to articulate, defining cruel, inhuman, or degrading treatment or punishment proved to be far less precise. Secondly, since the Convention imposes several legal obligations on state parties, obligations that must be reflected in their substantive criminal laws and procedures, it was essential to avoid assigning vague terms like cruel, inhuman, or degrading treatment or punishment. This circumstance underscores the fact that the Committee Against Torture, responsible for overseeing the implementation of the UNCAT, frequently points out that the distinctions

[40] See ECtHR, Joined Greek Case: Denmark v Greece, Application No. 3321/67; Norway v Greece, Application No. 3322/67; Sweden v Greece, Application No. 3323/67; Netherlands v Greece, Application No. 3344/67; Report of the Sub-Commission, 5 November 1969.
[41] Committee against Torture, H.M.H.I. v Australia, Complaint No. 177/2001, Decision, 1 May 2002, para 6.4.
[42] Publication of the United Nations Human Rights Office about Interpretation of Torture in the Light of the Practice and jurisprudence of International Bodies, 2011, p. 5.

between cruel, inhuman, or degrading treatment or punishment and torture are often ambiguous.[43]

The UNCAT emphasizes ethical and moral values as foundational principles that advocate for dignity, humanity, and the principles outlined in various international human rights treaties. In its preamble, the CAT makes specific reference to Art. 5 of the UNDHR and Art. 7 of the ICCPR. The preamble clearly articulates that the primary objective of the Convention is to enhance the effectiveness of efforts aimed at combating torture as well as inhuman and degrading treatment.[44]

Under Art. 16 the UNCAT stipulates the obligation *'undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment'*. The triggering of a state's positive obligation occurs when there is a certain threshold of severity met, regarding the interference with fundamental rights. However, in the context of the prohibition of torture, distinguishing between situations that trigger the state's positive obligation and those that do not can be more complex. This complexity arises because not every instance of interference with physical integrity, such as actions resulting in harm to health, necessarily carries criminal law implications. A critical factor in differentiating between these instances is whether the harm is inflicted by a public authority or a private individual. In cases where a violation is attributed to a public authority, the primary goal of conducting an effective investigation is to ensure that national regulations are properly implemented. This is especially vital given that public authorities can only act within the confines of the law. Therefore, it is essential to scrutinize their actions to uphold the standards set forth in human rights protections.[45]

The efforts and interpretations of the Committee against Torture, as reflected in its general comments and case law, play a crucial role in enhancing the understanding of the

[43] General Comment of the Committee Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment No. 2, 2007, para. 10.
[44] Preamble of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987.
[45] Čentéš, J. and Beleš,A. Európske aspekty práva na účinné vyšetrovanie v súvislosti s porušeniami zákazu mučenia a práva na život. In Čentéš, J and Kurilovská, L.: *Efektívnosť prípravného konania – skúmanie, hodnotenie, kritéria a vplyv legislatívnych zmien*, Akadémia Policajného zboru, 2021, p. 4.

UNCAT. Similarly, national courts often interpret the prohibition of torture within the framework of the non-refoulement principle. In its General Comment No. 1, the Committee Against Torture stated that when evaluating relevant cases, the risk of torture must be assessed based on evidence that exceeds mere theoretical speculation or suspicion. [46] However the risk does not need to be deemed absolutely certain, it must be both personal and actual. This interpretation was subsequently expanded upon in the Dadar against Canada case, which introduced the idea of a foreseeable and real risk.[47] It is also essential to recognize that the facts examined by the Committee typically originate from the state party involved. Nonetheless, the Committee has the authority to independently analyze this evidence and the specific facts in each case, as illustrated in the NTW v. Switzerland case. This sets a precedent for the Committee's ability to evaluate the complete context of each situation thoroughly. [48]

In summary, we can conclude that, despite the generally strong quality of the UNCAT text and its widespread ratification across the globe,[49] the UNCAT cannot truly be regarded as successful. This lack of success can be attributed to several factors, including inadequate enforcement by states, the absence of effective enforcement mechanisms within the UN, and the fact that many states that ratified the UNCAT do not genuinely intend to comply with its provisions. Nevertheless, the regulation holds significant importance because, in the jurisprudence of international courts, particularly *ad hoc* tribunals like the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, the UNCAT's definition of torture has served as a foundational reference point. [50] In the early phases of their operations, it was common for these tribunals to adopt the UNCAT's definition without question. However, subsequent rulings indicate that the courts are beginning to recognize the different characteristics inherent in international humanitarian law

[46] General Comment of the Committee Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment No. 2, 1997, para 6.
[47] Committee against Torture, Mostafa Dadar v Canada, Complaint No. 258/2004, Decision, 5 December 2005, para. 4.11.
[48] Committee against Torture, N.T.W. v Switzerland, Communication No. 424/2010, Decision, 6 July 2012, para. 7.3.
[49] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987, signatories: 83, parties: 173.
[50] ICTY, Prosecutor v Delalić, Mucić, Delić and Landžo, Case No. IT-96-21-T, Trial Judgment 16 November 1998; Proscutor v Anto Furundžija, Case No. IT-95-17/1-T, Trial Judgment, 10 December 1998; Prosecutor v Kunarac, Kovac a Vukovic, Case No. IT-96-23-T and IT-96-23/1-T, Trial Judgment 22 February 2001.

and human rights law, leading them to increasingly distance themselves from the definitions provided in the Convention.[51]

1.2. Case-law of the Committee against Torture

The monitoring mechanism of the UNCAT is based on its main system where all the parties have the duty to periodically report how they implement the rights enshrined in the Convention. This obligation is started one year after accession to the treaty and further every four years. The aim is to create some level of transparency and when necessary also political pressure through the observance of the Committee performing the evaluation of these reports. If we take into account, the possible publicity of international discussions, whether these periodic reports followed by recommendations of the Committee have the power to be effective is a rather intruiguing question. According to McQuigg even in modern and democratic countries the recommendations of the Committee have small or even no impact. Mainly those countries which are concerned regarding their international reputation respond to the mentioned political pressure based on the periodic recommendations of the Committee.[52]

Nonetheless, the additional value of the Committee is in its power to investigate upon individual complaints of alleged violations upon the universal criminal jurisdiction under the UNCAT. Where the State has the obligation to abide by the Convention, the Committee can look into the circumstances in numerous national facilities. The first case of found violation ever is from the year 2004. Three cases Dragan Dimitrievjic,[53] Dimitrov[54] and Danilo Dimitrijevic against Serbia and Montenegro[55] were the first cases where the Committee observed improper conditions based on an individual complaint. The first case of Dragan Dimitrijevic was based on the allegations that the police had arrested and handcuffed the victim to a radiator. Later, he was severely beaten and kicked. The acts of the policeman

[51] Burchard, Ch. *Torture in the Jurisprudence of the Ad Hoc Tribunals: A Critical Assessment*, Journal of Internationl Criminal Justice, Vol. 6/2, 2008, p. 162; Hassanová, R.L. Zákaz mučenia v rámci dohovorov medzinárodného humanitárneho práva, In *Liber Amicorum Dalibor Jílek*, rw&w Science & New Media Passau-Berlin-Prague, 2023.

[52] McQuigg claims that limited impact of the recommendation is observed in Denmard and Czech Republic, and little or no effect is observed in Icelands and Luxembourg. See McQuigg, R. *How Effective is the United Nations Committee against Torture?*, European Journal of International Law, Vol. 22/ 3, 2011.

[53] Committee against Torture, Dragan Dimitrijevic v Serbia and Montenegro, Communication n. 207/02, Decision, 24 November 2004.

[54] Committee against Torture, Jovica Dimitrov v Serbia and Montenegro, Communication n. 171/00, Decision, 23 May 2005.

[55] Committee against Torture, Danilo Dimitrijevic v Serbia and Montenegro, Communication n. 172/00, Decision, 16 November 2005.

caused him an open wound on his head, various injuries on his back, bleeding from his ear, injuries to arms and legs as well as swollen eyes and lips. The further case of Dimitrov and Danilo Dimitrievjic were similar. After their separate custody they were physically abused and had to recover from the ill-treatment. In all three cases the victims were Serbian citizens having Roma nationality. In all of the cases when the allegations from the side of the victims arose the state presented superficial responses. In one of the cases the national authorities denied that the abuse happened, even though giving no explanation to the submitted evidence of the medical reports. In another, the authority was collecting information for a prolonged period of 18 months resulting in no final response.[56] When the Committee considered the conditions of the cases, it declared, that the acts of state officials in the present cases fulfilled the elements set up in Art.1 of the UNCAT, i.e. the acts reaches the threshold of severe pain and suffering in order to fall under the notion of torture. The Committee declared violation of Art. 2 as the national authorities failed to investigate properly the claims. When considering the acts of policemen, it added that the purpose of these hideous acts were either intimidation or discrimination as all of the victims were of Roma origin.[57]

In the case of Guenguend against Senegal the applicants argued that they had been tortured in Chad based on the orders of its president Habré. When the Committee made a decision in the relevant case in 2006 the president had already fled to Senegal to seek protection. Thus, Senegal claimed that it had no jurisdiction over the allegations of illicit treatment in Chad and dismissed the claim. Nevertheless, taking into consideration Art. 5 and 7 the States have the obligation to prosecute or extradite a person if sufficient evidence of torture is existing. The UNCAT hence gives a possibility of choice to the country, however it does not allow passivity. The Committee therefore declared, that when Senegal failed to act in any matter it had violated Art. 5 of the UNCAT. Additionally, the Committee understood that a country may need certain time to implement these measures. Nonetheless, taking into consideration that Senegal has ratified the UNCAT in 1986, the breaches occurred from 1982 to 1990, complaints against Habré started already in 2000 and the decision of the Committee was presented in 2006, the national authorities had certainly sufficient time to act on the issue, however decided otherwise.[58]

The Guengueng case marks a significant milestone as it represents the first occasion on which breaches of universal jurisdiction obligations outlined in the UNCAT have been

[56] Committee against Torture, Dragan Dimitrijevic v Serbia and Montenegro, Dragan Dimitrijevic v Serbia and Montenegro, Communication n. 207/02, Decision, 24 November 2004, para 4.
[57] Ibid, para 3.
[58] Committee against Torture, Guenguend et al v Senegal, Communication n. 181/01, Decision, 17 May 2006.

identified in an individual complaint. This case affirms the individual's right under the UNCAT to ensure that their torturer is held accountable, regardless of where that perpetrator may be found, provided there is adequate evidence to support a prosecution. Moreover, this ruling reflects a growing trend observed over the past decades, highlighted by the establishment of the International Criminal Court, the contentious extradition proceedings involving Pinochet between the UK and Spain, and the United Kingdom's active exercise of universal jurisdiction concerning torture crimes in 2005. Collectively, these developments suggest a potential shift towards eliminating safe havens for individuals who commit acts of torture, signaling a commitment to justice and accountability on a global scale.[59]

1.3. International Covenant on Civil and Political Rights

ICCPR, Art. 7: *"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation"*[60]

Art. 7 prohibits three levels of illicit treatment, i.e. torture, inhuman and degrading treatment or punishment. Similarly, to other provisions of prohibition of torture, any restriction is strictly prohibited and the right has an absolute character. As provided in the derogation clause set in treaty's Art. 4, no derogation from this ban is allowed. The ICCPR does not explicitly define the term 'torture' in its provision. Thus, it is conceivable that the monitoring mechanism of the treaty, the Human Rights Committee (HRC), adopts a more flexible standard regarding this issue, which may make it easier to classify acts of torture or ill-treatment by non-state actors as violations of Art. 7 compared to the criteria set by the UNCAT. In fact, in the General Comment 20, the HRC emphasizes that the national authorities have a positive obligation to prohibit torture and inhuman or degrading treatment perpetrated also by private individuals.[61] The protection of the inherent dignity of the human person shall enhance acts of persons acting in their official capacity, outside their official capacity as well as private capacity. This acknowledgment underscores the HRC's commitment to addressing private attacks on a person's bodily integrity and dignity.

[59] Joseph,S. *Committee against Torture: Recent Jurisprudence*, Human Rights Law Review, Vol. 6/3, 2006, p. 577.
[60] International Covenant on Civil and Political Rights, N. 2200A (XXI), 1966.
[61] Committee against Torture General comment No. 2 on the implementation of Article 2 by States parties, No. CAT/C/GC/2, 2008, para. 2.

As there is no exact definition of the term in the text, the HRC is allowed more flexibility to interpret the article as the demand arises. The HRC has however decided that the most appropriate is not to differentiate between the notions of ill-treatment, adding that it is not necessary to create a list of prohibited acts. Consequently, even though agreeing with the existence of various levels of severity of hideous acts, the HRC regularly omits the proper specification of which ill-treatment was violated. The HRC has managed to expand and clarify the boundaries of the prohibition without providing a specific definition of the terms involved. Its reasonings include only the decision whether the whole article was either breached or not. Notably, despite not establishing a distinct definition of torture, the HRC has voiced concerns to states regarding their lack of provisions to explicitly define and criminalize torture within their domestic legal frameworks. This highlights the Committee's emphasis on the necessity for states to explicitly address and prohibit torture as a specific offense in their laws.[62]

The article includes interestingly in its second sentence reference to the prohibition of using people for medical and scientific experimentation without their consent, thus including these acts into the realm of ill-treatment. The specific prohibition was a reaction to the Nazi atrocities commited in concentration camps during W.W.II. The provision presents that persons deprived of their liberty, like prisoners are in an especially vulnerable position which can be easily abused by the public authority. The core word in the sentence is the term experimentation, which has to be understood as distinct from medical treatment. Prescription of medical treatment, which is necessary, does not breach the Art. 7 even without the consent of the person. Non-experimental treatment is allowed especially when conducted on mentally ill persons or persons with impaired decision-making capacity, including minors.[63]

The text of the treaty offers no interpretation whether the prohibition includes acts causing only physical pain or also both physical and mental pain. Here comes to play, the interpretation provided by the HRC, which sets that the assessment of the conditions in the case must include several factors, such as the duration of the treatment, the victims sex, age, health conditions including subjective elements as physical and mental effects of the

[62] See concluding Observations on Namibia (2004) UN doc CCPR/CO/81/NAM; Madagascar (2007) UN doc CCPR/C/MDG/CO/3; Barbados (2007) CCPR/C/BRB/CO/3; Botswana (2008) UN doc CCPR/C/BWA/CO/1.
[63] Nowak,M. UN Covenant on Civil and Political Rights. In Kehl am Rhein: *ICCPR Commentary*, Engel, 2005, p. 188-190.

treatment.[64] In the situation of the deprivation of liberty the HRC adds that the mere detention cannot be understood as a violation.[65]

Neither the text of the provision and nor the ICCPR itself offers reference to the non-refoulment principle. In the view of the HCR, in the General Comment 20, the States have the duty to refrain from exposing individuals to the danger of torture, cruel, inhuman or degrading treatment upon return to the country of their residence. The HRC in its case-law discussed that there should be an actual test performed prior to an expulsion of a person. The test includes assessment whether there is sufficient evidence that Art.6 or Art. 7 will be breached upon return. The most important is to assess the real risk of danger to the returned person.[66] Consequently, the work of the HRC enhances the widely recognized principle in its interpretations notwithstanding that the ICCPR omits its inclusion.

Regarding the connection of the prohibition to the capital punishment we may observe in the ICCPR that it is expressly dealt with in Art. 6. Nonetheless, in the right to life article, the treaty does not stipulate a general prohibition but rather an express exception to the article with strict conditions. An alternative method how to attack the treaty's compatibility with the capital punishment may be through Art. 7, via the argument of the death row phenomenon, which may constitute breach of this article. The phenomenon is understood as a prolonged detention which ends with the capital punishment as causing increasing mental anxiety and mental suffering which consequently leads to the violation of the prohibition of torture. Nevertheless, this phenomenon has been acknowledged by the ECtHR in the well-known Soering case, the HRC is generally denying similar approach in its decisions.[67]

When considering the interpretation of the HRC related to the corporal punishment we may come across certain irreguralities. In the case of Sooklal against Trinidad and Tobago, the HRC determined that the mere imposition of a sentence involving whipping, specifically 12 strokes with a birch constituted a violation of Art. 7.[68] Consequently, the imposition of corporal punishment causes mental distress which triggers the article but the imposition of capital punishment does not. This dissonance presents a complex challenge within the ICCPR, especially considering that the more severe form of punishment, capital punishment, is

[64] UN Human Rights Committee, Vuolanne v Finland, Communication n. 265/87, Decision, 7 April 1989, para. 9.2.
[65] Nevertheless, it is in place to ask whether the detention of a claustrophobic person would not trigger Art.7 if the person would experience severe mental pain solely on the basis of its captivity in a cell.
[66] UN Human Rights Committee, Pillai v Canada, Communicaation n. 1763/08, Decision, 25 March 2011.
[67] UN Human Rights Committee, Barrett and Sutcliffe v Jamaica, Communication No. 270/88; 271/88, Decision, 30 March 1992.
[68] UN Human Rights Committee, Sooklal v Trinidad and Tobago, Communication No. 928/00, Decision, 25 October 2001.

explicitly included only under Art. 6 of the Covenant. Consequently, this dynamic creates a perplexing scenario for the HRC, which is compelled to navigate the complexities of human rights standards while dealing with the inherent contradictions in the legal framework. Thus, while the HRC's decisions indicate a commitment to limiting inhumane and degrading treatment, the allowance for capital punishment complicates the conversation. It raises important questions about the relative severity of different forms of punishment and the implications for human dignity.[69]

Lastly, it is necessary to mention para 1 of the Art. 10 of the ICCPR: *"All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".*[70] The article represents an addition to Art. 7, as it reinforces specific aspects of deprivation of liberty and gives additional protection for this particularly vulnerable group. Generally, we may observe that this article bans less serious form of treatment than those included in Art. 7, thus widening the scope of protection given by the ICCPR and its mechanism of represented by the HRC.

1.4. The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)

As the issue of the prohibition of torture is based on situations where people are deprived of their liberty, it regularly revolves around the subject matter of the treatment of prisoners. Since the early attempts to create legal platform representing the basic requirements of treatment, through the Standard Minimum Rules from 1955, the core of the prison conditions was resting upon the principle of humane treatment. Althought the principles created by the resolution of the Economic and Social Council were setting a great starting point, with time and the increase of prison population, it became clear that these have to be revised in order to properly react to the changes in the society.[71] An expert groups' work result was the creation of the actual Standard Minimum Rules known under the name Nelson Mandela Rules, accepted by the General Assembly in 2017.[72] Althought the document has a legally non-binding nature its status is growing over the years, by influencing the national

[69] Joseph, S. And Castan, M. *The International Covenant on Civil and Political Rights. Cases, Materials and Commentary*, Oxford University Press, 3 ed, 2013, p. 277.
[70] International Covenant on Civil and Political Rights, 1966.
[71] Resolution of the Economic and Social Council 663 (XXIV), Standard Minimum Rules for the Treatment of Prisoners, 1957.
[72] United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), GA resolution 70/175, 2015.

developments regulating the prison conditions, including the jurisprudence of national courts. Several scholars claim that in fact the document as a whole is not binding but numerous provisions enjoy the status of the customary law.[73] Without a doubt part of these customary provisions are those which declare in any form the prohibition of torture.

The high value of the prohibition in the document is obvious already from its first sentences, as already the first rule sets that no prisoner shall be subjected to any form of ill-treatment. The provision explicitly refers to the absolute nature of the rule, declaring that no justification can be invoked for such acts. The first rule further adds a reference to the guarantee of the security of any person being inside prison facilities, including staff, service providers and visitors.[74]

Prison conditions enhance systemic deprivation and the failure to uphold some fundamental rights essential for a humane and dignified existence. It stems in the punitive character of the sanction. Nevertheless, this sanction shall not constitute a systematic practice of inhuman or degrading treatment or punishment. While it is true that prison systems are frequently underfunded, this should not serve as an excuse for neglecting the refurbishment of detention facilities, for failing to provide basic supplies, or for not ensuring adequate food and medical care.[75] Specifically, circumstances that can lead to cruel, inhuman, or degrading treatment, and even torture, often arise from factors such as overcrowding, inadequate ventilation, unsanitary living conditions, prolonged solitary confinement, keeping suspects without communication, failure to separate different categories of prisoners, and housing individuals with disabilities in environments that are not proper for their needs. The Rules reflect the need for proper living conditions of the prisoners, in provisions related to their accommodation,[76] personal hygiene,[77] clothing and bedding, food [78] or acces to health-care or exercise and sport.[79]

The document stipulates in its rule 8, the necessity to manage the prisoners file profoundly including requests or any complaints related to illicit treatment. The later rule 57 sets that these allegations have to be dealt with immediately and properly, i.e. a prompt and

[73] See Clark, R.S. *The United Nations Crime Prevention and Criminal Justice Program*, University of Pennsylvania Press, 1994; Rodley, N.S. and Pollard, M. *The Treatment of Prisoners under International Law*, Oxford University Press, 2009.
[74] Rule 1 of the The Nelson Mandela Rules.
[75] Interim Report of the Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, No.Doc. A/68/295, 2013, para 45.
[76] Rule 12-17 of the Nelson Mandela Rules.
[77] Ibid, Rule 19-21.
[78] Ibid, Rule 22.
[79] Ibid, Rule 23-30.

impartial investigation has to be performed by an independent authority.[80] The question what exactly is meant by independent authority is however in place. Whether there should be set up a committee not having any connections to the facility, or it should be performed by a judicial authority is up to the states' decision. Nonetheless, the rule 71 demands that these allegations, including also situations of custodial death, disappearance or serious injury are to be dealth within effective investigation by a non-prison administration.[81]

The most influential may seem the provision which concern health-care services and medical treatment of prisoners. Access to medical care is an essential and fundamental requirement for ensuring that prisoners receive humane treatment. Medical care and treatment, including necessary examinations, must be conducted promptly, independently, and with the informed consent of the individual. Health assessments should take place upon a person's admission to a detention facility and after every transfer between facilities, followed by regular, routine evaluations. Consistent medical check-ups serve as a crucial safeguard against potential ill-treatment.[82] The Rules in some ways demand the same patient-health professional relationships as those outside the prison environment, including the absolute prohibition of actively or passively engaging in ill-treatment which would be constituted by medical experimentation. Additionally, the professional has the duty to properly observe and examine the health of the prisoner in order to detect any signs of ill-treatment on the physical or mental status of the prisoner. This includes application of safeguards which would prevent the prisoner from being under the risk of any further harm, if the practicioner discovers signs of unproper behaviour.[83]

The Rules properly address particularly vulnerable groups such as mothers and children born in prisons as well as people with mental disabilities or specific health conditions. Rule 28 and 29 stipulate the necessary arrangements to mothers and children born in prisons. These include special accommodation as well the demand arising from the Convention on the Rights of the Child stating, that the childs best interest has to be taken into account.[84] According to the research of professor Dorigo, approximately 80% of women prisoners are mothers, which means the prison system should include the possibilities to either maintain contact or when the child is a baby special prenatal and postnatal care and

[80] Ibid, Rule 8.
[81] Ibid, Rule 71.
[82] Mendez, J.E. *Right to a Healthy Prison Environment: Health Care in Custody under the Prism of Torture*, Notre Dame Journal of International and Comparative Law, Vol. 9/1, 2019, p. 42.
[83] Rule 34 of the Nelson Mandela Rules.
[84] Convention on the Rights of the Child, opened for signature 20 November 1989, U.N.T.S. 1577, entered into force 2 September 1990.

treatment.[85] Mother declined of contact with their children may directly suffer from severe mental health problems which can even lead to self-harm. In extreme situations, when proven that the aim of the authorities is to punish the women prisoner, the acts may be considered as violation of the prohibition of torture.[86] Similarly, persons with disabilities may need special arrangemenets, which may cause pain when omitted. As people with intellectual disabilities may experience heightened level od powerlessness they are in an especially vulnerable position. Thus, their discriminatory treatment may inflict pain and suffering, further leading to ill-treatment.[87]

Although, non-binding, the Nelson Mandela Rules shall be understood as a crucial ground for legislators and experts setting up prison standard. Upholding the dignity of prisoners is a fundamental right that is inherently tied to the responsibilities of states to create a non-threatening environment for individuals who are deprived of their liberty. Ensuring such an environment goes beyond mere structural integrity of prison facilities. It encompasses a comprehensive approach to health that includes access to adequate medical care and treatment. This access should cover a wide range of essential health services, including dental care, psychological support, rehabilitative programs, and other medical treatments necessary to promote the overall well-being of inmates. Moreover, it is vital that prisoners have opportunities to engage in physical exercise, which is crucial for both their mental and physical health. Regular exercise can help alleviate the stress and psychological burdens that often accompany incarceration, thereby contributing to the dignity and humane treatment of those in detention. In essence, the commitment to preserving the dignity of prisoners is not merely a legal obligation but a moral imperative that underscores the importance of human rights within the justice system. By prioritizing these aspects, states can fulfill their obligations stemming from the provisions stipulating prohibition of torture, while promoting rehabilitation and respect for the inherent dignity of every individual.

[85] Dorigo, M.E. Mothers Behind Bars: Reflecting on the Impact of Incarceration on Mothers and their Children. In Center for Human Rights and Humanitarian Law: *Gender Perspective on Torture: Law and Practice*, 2018, p. 239-242.
[86] See Akumadu, T. *Patterns of Abuse of Women's Rights in Employment and Police Custody in Nigeria*, University of Virginia, 1995.
[87] See para 40, 63-65 of the Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, No. Doc. A/HRC/22/53, 2013; Rule 109-110 of the Nelson Mandela Rules.

1.5. Concluding remarks on the universal human rights system

The prohibition of torture stands as a fundamental tenet of international law, firmly taking standing as a *ius cogens* norm, indicating its absolute nature. This universal ban is derived from a global consensus rather than a methodically drafted set of regulations. As a result, the definitions surrounding this prohibition are often ambiguous, which can be both advantageous and detrimental. While the flexibility inherent in customary law may allow for broader interpretations, the lack of a solid foundation often raises questions about the commitment of various states, especially when many continue to perpetrate acts of torture.

Central to the discourse on torture is the recognition that its definition is frequently included in various international treaties, albeit without a clear consensus on the terminology employed. The UNCAT provides a vital definition, outlining essential elements necessary for an act to be classified as torture. However, numerous treaties fall short of articulating the distinction between torture and other forms of ill-treatment, resulting in gaps that complicate enforcement and accountability. The two most significant universal treaties in the matter the UDHR and the ICCPR, enshrine the right to be free from torture and inhumane treatment, emphasizing the inherent dignity of every person. Article 7 of the ICCPR, which forbids torture, cruel, inhumane, or degrading treatment, affirms that such rights are absolute and cannot be waived under any circumstance. Importantly, the HRC interprets these provisions with a degree of flexibility, recognizing the obligation of states to safeguard individuals from abuses, including those perpetrated by private individuals.

While nations around the world have ratified the ICCPR as well as the UNCAT, the challenge remains regarding the actual enforcement of the rules against torture. The chapter noted various cases where states failed to act in accordance with their obligations, underscoring the gap between legal standards and practical implementation. The cases reviewed, including those of Guengueng, Sooklal, and the three Serbian cases, illustrated the complexities of interpreting torture definitions within a legal context, particularly in relation to factors such as state responsibility and the treatment of vulnerable groups.

In conclusion, the prohibition of torture, while firmly established within international law, faces ongoing challenges related to its implementation and interpretation. The evolving case law emphasizes the necessity of addressing inadequacies in the legal definitions surrounding torture and ill-treatment. As states navigate the complexities highlighted in this chapter, there is a pressing need for enhanced commitment to human rights principles, especially as they relate to the rights of vulnerable people. By reinforcing the frameworks

designed to combat torture and ensuring strong enforcement of international obligations, the global community can work towards protecting human dignity and ensuring that the fundamental rights of all individuals are upheld in the face of growing challenges. Acknowledging and addressing these interconnected issues is crucial for forging a path toward a more just and humane world, where the rights of every person are respected and safeguarded.

II. Torture under the European legal and judicial framework

At the first look, one might believe that the right to life is the foremost human right, which cannot be infringed upon under any circumstances. However, when considering the prohibition against torture, it often supersedes the right to life in certain contexts, as it is regarded as non-derogable and absolute, rooted in principles of natural law and human dignity. Two controversial issues typically surface in discussions of the prohibition against torture: the ethical dilemma of weighing the value of saving a life against the use of coercive methods to extract vital information, and the issue of whether the victim's consent is meaningful in these situations.

The right in question is considered absolute, which means it is universally applicable to all individuals without exception. This applies irrespective of whether those individuals have engaged in serious criminal activities or pose any threat to the nation in which they currently reside. Furthermore, the prohibition against torture and against inhuman or degrading treatment or punishment is, although not stated explicitly, fundamentally linked to the legal impossibility of a state extraditing foreign nationals back to their countries of origin. This extension of rights to all persons, including those who are not citizens of European nations, marks a significant breakthrough in the framework of human rights protection. Consequently, it is important to note that many legal cases related to the provisions that prohibit torture revolve around the principle of non-refoulement, which prevents the forcible return of individuals to places where they may face such treatment. This principle reinforces the commitment to human dignity and safety for all individuals.[88]

Determining what actions qualify as a breach of the right to be free from torture and cruel, inhumane, or degrading treatment is subjective and hinges on various elements of each specific case. Typically, the European judicial framework, comprising both the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), operates under the understanding that any ill-treatment must attain a certain threshold of severity. In the context of asylum applications, the onus of demonstrating this threshold primarily rests with the individual seeking international protection through asylum or alternative measures. The evidence must be focused on establishing that the person in question faces genuine risk, taking into account their unique circumstances and the conditions they would encounter if returned to their home country. This is particularly relevant in

[88] Hassanová, R.L. *The Prohibition of Torture and its Implications in the European Legal Sphere*, Central European Journal of Comparative Law, Volume IV, 2023/1, p. 68-69.

instances where the overall situation in the home country cannot be assessed as one where any individual might face a credible threat of torture or cruel, inhumane, or degrading treatment.

European human rights treaties establish the prohibition of torture and ill-treatment as essential rights that states are obligated to uphold, much like the guidelines found in the UNCAT. International organizations issue documents that assess adherence to these human rights treaties, offering frameworks for understanding and implementing these fundamental rights, which include the prohibition of torture and ill-treatment and the associated responsibilities of the state in protecting these rights. Currently, thanks to the work of international entities, we have access to a substantial body of European case law addressing the conceptual elements of torture and ill-treatment, identifying offenders, outlining the criteria for classifying behaviors that fall under the prohibition, and recognizing the state's duty to safeguard fundamental rights. Among these frameworks, the European human rights protection system stands out as possibly the most advanced and influential globally, particularly regarding the prohibition of torture.

2.1. Council of Europe's Framework

2.1.1. European Convention on Human Rights and the case-law of the European Court of Human Rights

ECHR Art. 3 *'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'*[89]

The European human rights system is the most elaborated international framework for safeguarding human rights, particularly regarding the prohibition of torture. This system was developed within the Council of Europe ("CoE"), an intergovernmental organization founded in 1949 by several Western European nations dedicated to championing individual liberties, democracy, and the rule of law. The ECHR was adopted by CoE member states in 1950 and became effective in 1953.[90]

Article 3 of the ECHR articulates the prohibition of torture, marking it as one of the most significant provisions of the Convention and underscoring its critical role within the Council of Europe. A key focus of this prohibition is the severity of pain and suffering

[89] Article 3 of the European Convention on Human Rights, 1950.
[90] Buergenthal,T. *Nemzetközi emberi jogok*, Budapest: Helikon, 2001, p. 89.

involved. According to established case law, certain actions are recognized as instances of torture, where the nature of the offense inherently implies and results in severe pain or suffering. Therefore, it is sufficient for the prosecution to demonstrate the actions taken in these cases.[91]

The jurisprudence of Central European constitutional courts illustrates varied approaches to interpreting and enforcing the provisions of Article 3. One method involves an illustrative enumeration of what constitutes torture, as seen in the practices of the Constitutional Court of the Czech Republic. This court has compiled a list of specific consequences that significantly heighten the level of intervention inflicted on individuals. Examples include police interventions, severe leg injuries accompanied by tissue necrosis leading to amputation, gunshot wounds impacting internal organs without leaving permanent damage, double jaw fractures, the extraction of three teeth, ear injuries, and extensive bruising across larger areas of the body. The Czech Constitutional Court views these instances of brutality as easily categorizable as torture due to their severe nature.[92] In contrast, the Hungarian Constitutional Court employs a different perspective when applying the definition outlined in the ECHR. For the Hungarian court, establishing an act as torture necessitates demonstrating that the behavior directed at the victim results in a significant degree of suffering. Moreover, it requires proving that the actions were intentional and aimed at inflicting pain, often with motives such as extracting information or intimidating the victim.[93] The Slovak Constitutional Court adds yet another dimension to the interpretation of torture and ill-treatment. It posits that every punishment inherently involves a requirement for the affected individual to endure interference with their rights in accordance with the penal system. This enforcement ought to reflect societal disapproval of the crime committed. Consequently, it is reasonable to assume that in most, if not all, instances of court-mandated punishment, individuals may endure feelings of humiliation or experience mental or physical discomfort, which they might recognize as "hardship" or "suffering." However, for the purposes of Article 3 of the Convention, the treatment or punishment must be of such intensity that it inflicts mental or physical suffering that attains a particular threshold of severity, thereby qualifying it as torture or inhumane treatment. This nuanced understanding

[91] Kovács, L. and Sánta, F. *A kínzás bűntette a nemzetközi büntetőjogban*, Miskolci Jogi Szemle, Vol. 5/2, 2010, p. 23.
[92] Para 43 of the Czech Republic Constitutional Court decision. no. Sp. Zn. III. ÚS 2012/18.
[93] Para 34 of the Hungarian Constitutional Court decision no. 32/2014. (XI.3.) [137]; Decision no. 6/1996; (VII. 12.).

underscores the complexity of defining torture across different judicial contexts within Central Europe.[94]

The prohibition of torture would remain a mere formality devoid of real substance if it did not simultaneously require states to integrate clear legal definitions of actions constituting offenses such as killing, torture, or inhumane treatment into their substantive criminal law. Moreover, there is an essential need for states to implement an effective legal framework governing criminal proceedings that not only delineates these illicit acts but also ensures that the legal standards are enforced in practice. Merely enacting national legislation aligned with the text of the ECHR is insufficient. Member states bear the responsibility for the actual realization of these guaranteed rights in everyday scenarios.[95] The prohibition of torture inherently includes a positive obligation for states party to the ECHR to investigate any claims of ill-treatment thoroughly. Without this obligation, the prohibition would remain purely theoretical and illusory, essentially enabling perpetrators to operate without fear of accountability. This requirement aligns with the absolute nature of the prohibition, which mandates that states establish a coherent legislative framework and enforcement mechanisms capable of addressing credible allegations of torture effectively. If these systems do not adhere to the prescribed duties for thorough investigation, the state must find alternative ways to combat impunity. This obligation ties closely to the broader question of how to maintain the principles of the rule of law within the national justice system. However, even with a wide framework in place, a state may still inadvertently fail to meet its positive obligations. In such circumstances, mechanisms within the European human rights system come into play, particularly the Council of Europe's framework, which allows victims to appeal to the ECtHR. Thus, the jurisprudence of the ECtHR serves as a critical reference point, illustrating how to enforce the prohibition against torture and hold violators accountable for their actions. The court's decisions not only establish legal precedent but also reinforce the necessity of accountability and effective remedies for victims, ensuring that states uphold their obligations under international law. This comprehensive approach reflects the commitment to not only enshrine rights in law but to activate them through diligent enforcement and genuine respect for human dignity. [96]

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[94] Slovak Constitutional Court decision n. PL. ÚS 6/09. Overview of the Constitutional Court Decisions, 2012, p. 4.

[95] Čentéš, J. and Beleš, A. Európske aspekty práva na účinné vyšetrovanie v súvislosti s porušeniami zákazu mučenia a práva na život. In Čentéš, J and Kurilovská, L.: *Efektívnosť prípravného konania – skúmanie, hodnotenie, kritéria a vplyv legislatívnych zmien*, Akadémia Policajného zboru, 2021, p. 4.

[96] Savnidze, E. *Effective Investigation of Ill-treatment: Guidelines on European standards*, Council of Europe Publishing, 2014, p. 9.

The case law of the ECtHR is fundamentally rooted in its interpretation of the scope and nature of Article 3. The ECtHR first defined the concept of torture in the landmark case of Ireland v. the United Kingdom, where it asserted that for certain actions to be classified as torture, they must meet a minimum threshold of severity and seriousness that cannot be deemed unjustifiable. In this context, torture is understood as an aggravated form of treatment that can manifest in degrading or humiliating ways or through coercive measures that compel the victim to act against their will or moral beliefs. While the ECtHR provides guidance on the concept of torture, it stops short of offering a precise definition of how the minimum threshold should be interpreted and applied in practical settings. Nevertheless, a significant aspect of this ruling is the clear distinction made between torture and the broader concepts of inhuman or degrading treatment. There the Court delineates these concepts into two categories, with the differentiation stemming from the intensity of the suffering inflicted. Torture is characterized as a deliberate act that causes severe and cruel suffering to the victim. Thus, when discussing the notions of torture and inhuman treatment, it is essential to associate the term torture with a unique stigma due to the severity of harm involved. [97]

In this particular case of Ireland v UK, the ECtHR elaborated that the acts in question satisfied all the criteria outlined in Article 3. These acts were aimed at extracting confessions, identifying other perpetrators, and gathering information. Notably, these actions were carried out systematically, guided by the intention behind them, thus, the negligence of those involved was ruled out. Crucially, the actions were executed by official authorities, as the individuals in question were members of the security forces operating in Northern Ireland. [98] This context emphasizes the responsibility of state actors in relation to the prohibition of torture and reinforces the Court's commitment to ensuring accountability for such violations. The ECtHR's interpretations and rulings serve to clarify the legal standards for torture and inhumane treatment while underscoring the need for strong safeguards against such abuses across member states.[99]

In this context, the ECtHR has determined that the primary factor preventing certain acts from being categorized as torture is the absence of an extreme level of suffering and pain. Within this framework, the Court has afforded a considerable margin of appreciation to the state in question, asserting that national authorities are better positioned than international judges to assess the extent of extreme pain and suffering. However, it is evident that this

[97] ECtHR, Ireland v The United Kingdom, Application No. 5310/71, Judgement, 13 December 1977, para. 167.
[98] Ibid, para 166.
[99] Sonnevend, P. and Bodnár,E. *Az Emberi Jogok Európai Egyezményének kommentárja*, Budapest: hvgorac, 2021, p. 41.

interpretation of the distinction between related concepts remains somewhat narrow and ambiguous, given the vague language used by the ECtHR. Furthermore, it is important to note that while the ECtHR's case law has sought to clarify the differences between these concepts, it has not specifically outlined their concrete aspects. Nevertheless, the Court has repeatedly affirmed this distinction, as exemplified in the case of Ireland v. the United Kingdom, which references the differentiation already established in Art. 3.[100]

The current interpretation of torture and its elements in the case law of the ECtHR significantly differs from the views held in the early jurisprudence of the Court. Today, the perspective on the prohibition has expanded, allowing for the consideration of less stringent and severe actions, while still requiring that such actions result in significant harm to the victim. Notably, many actions that were previously not classified as torture are now recognized within this framework. The brief analysis of the landmark case Ireland v. the United Kingdom illustrates a historical perspective that has influenced the evolution of international court case law over time.

The interpretation of the differentiation between related concepts has been shaped by numerous important ECtHR rulings. This framework can be categorized into a vertical approach, comprising three distinct concepts: torture, inhuman treatment, and degrading treatment. Various interpretations have emerged based on the severity associated with actions categorized under these terms. The differentiation is grounded in the intensity of pain or suffering, with torture representing the most severe category, and degrading treatment being the least serious. [101] In the case of Selmouni v. France, the ECtHR emphasized that the high standards of human rights protection necessitate a more rigorous approach to identifying violations of fundamental values, including personal integrity and mental and physical well-being. [102] This case underscores the importance for the ECtHR to reassess its interpretation of Article 3 over time, as it may be necessary to refine the distinctions among these concepts based on the degree of harm inflicted.

The case of Keenan against United Kingdom is significant when discussing the concept of threshold in the context of the ECtHR. In this instance, the applicant's son, Mark Keenan, tragically took his own life while incarcerated, a situation attributed to failures on the part of prison authorities, including inadequate monitoring, insufficient psychiatric care, and improper treatment during his segregation. In its 2001 ruling, the ECtHR made it clear that

[100] ECtHR, Aktas v. Turkey, Application N. 24351/94, Judgment, 24 April 2003, para 313.
[101] Evans,M.D. *Getting to Grips with Torture,* The International and Comparative Law Quarterly, Vol. 51/2, 2002, p. 370.
[102] ECtHR, Selmouni v France, Application No. 25803/94, Judgment, 28 July 1999, para. 101.

the severity of pain or suffering is just one factor within a more intricate framework. The Court acknowledged the challenges involved in defining the threshold that separates these concepts. Consequently, the ECtHR has maintained a degree of flexibility in its approach, allowing for decisions to be made on a case-by-case basis.[103]

In the Gäfgen case, the interpretation by the ECtHR likely represents a significant expansion in the understanding of torture and its defining elements. [104] The case revolved around Mr. Gäfgen, who had kidnapped the 11-year-old son of a German banker and was apprehended following interrogations aimed at uncovering the child's whereabouts. During the interrogation, a police officer threatened Gäfgen with severe physical pain in an effort to extract information and potentially save the child's life. [105] The ECtHR determined that Gäfgen experienced inhuman treatment, as the threat posed was both real and immediate, leading to mental distress and potential long-term psychological effects. The victim found himself in a precarious situation where the interrogators misused their authority. The police officer explicitly stated that this threatening tactic was employed as a means to rescue kidnapped children. The Court affirmed that the mere threat of physical pain meets the minimum level of severity outlined in Article 3, classifying it as inhuman treatment rather than torture. This conclusion was grounded in the Court's commitment to social expectations regarding the protection of not only physical integrity but also human dignity, which is safeguarded under Art. 3.[106]

The Gäfgen case is particularly noteworthy for its implications regarding the ECtHR's approach, which suggests a form of balancing, despite Article 3 explicitly prohibiting such an action. The case raised a critical question about the tension between the imperative to save a child's life and the need to protect fundamental human rights rooted in natural law with a peremptory nature. The ECtHR took a firm stance, asserting that even in extreme situations where innocent lives are at stake, the justification for ill-treatment cannot be accepted. Several reasons underpin this conclusion. Firstly, Articles 3 and 15 of the ECHR indicate that derogation clauses do not apply to rights characterized by their absolute nature. The ECtHR clarified that even a public emergency threatening the life of a nation cannot serve as a valid exception to the prohibition on torture. Secondly, upholding the enforcement of Article 3

[103] ECtHR, Keenan v the United Kingdom, Application No. 27229/95, Judgment, 3 April 2001, para 112.
[104] See ECtHR, Gäfgen v. Germany, Application No. 22978/05, Judgment, 1 June 2010.
[105] The case has no happy ending, since Mr. Gafgen has suffocated the child previously of arresting him. The police officer investigating has, however, considered the child to be alive; hence, applying such methods as threat.
[106] ECtHR, Selmouni v. France, Application No. 25803/94, Judgment, 28 July 1999,para. 101.
[106] ECtHR, Gäfgen v. Germany, Application No. 22978/05, Judgment, 1 June 2010, para.108.

violations safeguards the core values of democratic societies, closely linked to the absolute prohibition of torture. Lastly, the unequivocal decision to outlaw torture in all circumstances reflects a societal demand, leading to a widespread acknowledgment of this right across various contexts. As such, it communicates a clear message to society: public authorities cannot, under any circumstances, justify acts of torture.[107]

As the last remark on the case, the author would like to reflect on and present certain criticisms of the wide understanding of Art. 3, as presented above in the ECtHR decision. In the author's opinion, the ECtHR in the present case incorrectly dealt with the question of balancing the right to life and the prohibition of torture. The ECtHR supported its argument by considering that the threat of torture must be understood as torture itself. Nevertheless, these two notions should be considered separately for the situation at hand. First, it is not only important to investigate the negative mental consequences of such threats, but it is even more difficult to prove them. Second, the effects of detention, interrogation, and procedural measures have negative mental consequences. Of course, these measures have no purpose of gaining information or confession. However, as Art. 3 explicitly mentions, the purpose of restricting persons' freedom for different reasons does not exclude these acts based on the aspect of purpose.[108] Third, the assumption that the threat of torture is worth more than the life of a nation is questionable. If the investigator, when balancing the right to life of a nation, decided that the threat of torture was worth more, he would be at least subject to criticism but probably even criminal procedure.

One of the most crucial questions which came to the fora already in the Gäfgen case, was the issue of admissibility of the evidence which were obtained by ill-treatment. The Court set that there has to be a distinction of the real evidence (physical objects as a body or a weapon) and the evidence gathered by coercive statement. In the pertinent case, the Court even contemplated, that excluding all evidence obtained by the breach of Art. 3 may be an appropriate redress.[109] Later on, in case of Ćwik v Poland the ECtHR reaffirmed this position. The case went even further, as it contemplated the admissibility of a video which was used as evidence during Polish investigation. The video was presenting the defendant as being victim of coercive interrogation perpetrated and filmed by a drug cartel member. ECtHR declared

[107] Yiallourou S. *The Gafgen v Germany case, the European Court of Human Rights and the Prohibition of Torture and Inhuman or Degrading Treatment or Punishment*', 2019, [online]. Available at: https://www.academia.edu/7977649/The_Gafgen_v_Germany_case_the_European_Court_of_Human_Rights_and_the_Prohibition_of_Torture_and_Inhuman_or_Degrading_Treatment_or_Punishment (Accessed: 9 November 2022).
[108] The UNCAT in its Article 1 also does not include exhaustive list of the element of purpose.
[109] ECtHR, Gäfgen v. Germany, Application No. 22978/05, Judgment, 1 June 2010, para 173-178.

that although the application raises issues under Art. 6 of the Convention, the principle stemming in Art. 3 has to be highly relevant when examining the issue.[110] Additionally, the admission of these evidences would besides breaching the Art. 3 render a trial unfair. In the Ćwik case the Court declared, that this applies not only where the victim of the treatment was also the defendant against whom the resulting evidence would be use, but also where the evidence would be used against third parties.[111] By this decision the jurisprudence reinforced the absolute nature of the prohibition by clearly banning all evidence obtained in ill manner. By this the ECtHR attempts not only to prevent authorities from manipulating the trial but also to eliminate any temptation to use coercive methods.[112]

In discussions surrounding the case law of the ECtHR with respect to the prohibition of torture, it is crucial to highlight the landmark Soering case. This pivotal case centered on the extradition of an individual, the applicant, to the United States, where he faced prosecution for a crime that could lead to capital punishment or life imprisonment in Virginia. Following a comprehensive analysis of the situation, the ECtHR concluded that extraditing the applicant would lead to a violation of Art. 3 of the ECHR, which prohibits torture and inhumane or degrading treatment or punishment. The decision in the most renowned torture case of Soering, set a significant precedent for subsequent legal decisions concerning extradition among member states of the Council of Europe.[113] It established critical principles regarding the protection of individuals from potential human rights violations in situations where they could face severe penalties or ill-treatment upon return to their home countries. The implications of the Soering case extend well beyond the realm of criminal law, they impact the broader landscape of state responsibility and human rights law. In many Central and Eastern European nations, for example, a sizable number of cases related to the prohibition of torture often arise from issues related to asylum law. These cases frequently encompass concerns about the safety of individuals being sent back to their home countries, where they might encounter the risk of persecution, torture, or inhuman treatment. The Soering case is particularly noted for its influential role in shaping legal frameworks around asylum and extradition, emphasizing the need for thorough risk assessments regarding the treatment applicants may face upon their return. Nevertheless, while the Soering case is widely recognized for its effects on asylum law, this particular dimension is not the primary

[110] ECtHR, Ćwik v Poland, Application No. 31454/10, Judgment, 5 November 2020, para 59-65.
[111] Ibid, para 77.
[112] See Thienel,T. *The Admissibility of Evidence Obtained by Torture Under International Law*, European Journal of Internationl Law, Vol. 17/2, 2006.
[113] Lillich, R.B. *The Soering Case*, The American Journal of International Law, Vol. 85/1, 1992, p. 128.

focus of the current chapter. Instead, the author intends to explore other aspects of the prohibition of torture within the ECtHR's jurisprudence. Nonetheless, the significance of the issues raised by the Soering decision cannot be overlooked; it highlights the ongoing challenges and responsibilities that states face in safeguarding human rights while balancing the complexities of international legal obligations. Ultimately, the case serves as a cornerstone in the evolving interpretation and enforcement of human rights protections across Europe.[114]

Lastly, an important development in understanding the scope of the term torture is reflected in the decision of Aydin against Turkey, which marked a significant moment in the jurisprudence of the ECtHR by recognizing rape as an act qualifying as torture for the first time. In this ruling, the Court asserted that the act of rape met the criteria outlined in Art. 3 of the ECHR, classifying it as an especially severe form of ill-treatment that inflicts profound mental harm on the victim, often lasting for an extended period. Indeed, the psychological repercussions of such acts can be far more enduring than the physical scars typically associated with other forms of violence, which tend to heal more quickly. The ECtHR described the harm inflicted by rape as comprising a series of horrific and humiliating experiences, particularly given the context in which the victim was deprived of her freedom. Furthermore, the motivation behind the act was significant; it was implemented with the intention of extracting information from the victim. This case, therefore, represents a landmark decision that broadens the understanding of what constitutes torture, establishing a more inclusive interpretation.[115]

It is also essential to consider previous decisions where the Court refrained from classifying rape as torture in similar circumstances. For instance, in the case of Cyprus v. Turkey, despite strong evidence pointing to instances of mass rape by security forces, the European Commission did not recognize these acts within the framework of Art. 3. This precedent highlights the evolving nature of legal interpretations regarding torture.[116] In its ruling in Aydin v. Turkey, the ECtHR acknowledged that while rape committed by private individuals against another private individual generally does not meet the criteria for torture—primarily due to the lack of a specific purpose and the absence of state authority and detention—acts of rape perpetrated by state actors, especially within the context of abuse of power, fall squarely within the realm of torture. This nuanced approach underscores the Court's commitment to protecting human rights and highlights the importance of context in

[114] See ECtHR, Soering v. the United Kingdom, Application No. 14038/88, Judgment, 7 July 1989.
[115] ECtHR, Aydin v. Turkey, Application No. 23178/94, Judgment, 25 September 1997, para. 83.
[116] See ECtHR, Cyprus v. Turkey, Application No. 25781/94, Judgment, 12 May 2014.

determining the classification of acts as torture. Overall, the Aydin case represents a pivotal step forward in expanding the legal definitions surrounding torture, providing critical protections for victims of such heinous acts.[117]

2.1.2. European Convention for the Prevention of Torture and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

The year 1989 marked a significant step in the combat against torture, when the European Convention for the Prevention of Torture created an innovative framework by requiring state parties to establish national preventive mechanisms, including an instrument – an international body- which has a mandate to pay visits in the jurisdiction of the ratifying countries. The Convention created the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, with the duty to manage periodic visits to places of detention in each of the member states. At the time of drafting, the European Convention for the Prevention of Torture was a sole project establishing a world-wide treaty-based mechanism aiming to control and regularly observe the domestic application of the human rights obligations. Hence, with the optional protocol to the UNCAT convention in 2006, the Committee Against Torture became just the second body being responsible for internal checks upon countries concerning prohibition of torture.[118]

The first president of the Committee, Antonio Cassese claimed that: *"The Commitee has shown that by now even the innermost recesses of state practices are open to international scrutiny. The barrier of state sovereignty has been torn down, at least in this area."*[119] The creation and work of the Committee is certainly one of the triggers in the noteworthy growth in the density and the complexness of the case-law of the ECtHR in the recent 35 years. The widening of the notions under the lenses of the ECtHR have become reality, which we may observe also on the proportional growth of the numerous soft law instruments in the field. Some of these instruments, such as the European Prison Rules[120] or

[117] McGlynn, C. *Rape, Torture and the European Convention on Human Rights: Expanding the Boundaries*, International and Comparative Law Quarterly, Vol. 58/3, 2009, p. 2.
[118] Bicknell, Ch. Evans, M. Morgan, R. *Preventing Torture in Europe*, Council of Europe Publishing. Strasbourg. 2018. p. 10.
[119] Cassese, A. *Human Rights in a Changing World*, Blackwell Publishers, 1994, p.115.
[120] Recommendation Rec 2 of the Committee of Ministers to member states on the European Prison Rules. 2006.

the UN Standard Minimum Rules for the Treatment of Prisoners[121] have certainly some impact on the drafting of binding agreements as well as on the work of international courts.

The Committee is composed multidisciplinary, i.e. out of people coming from various fields. The majority of the members are professionals from legal field, however a notable number of members are medical doctors or experts from different scientific field relevant to the investigated context. Additionally, even the legal experts are generally dealing with different fields of law, coming from constitutional lawyers to human rights defenders. These candidates are appointed by the member states from its experts. These candidates are then elected by the Committee of Ministers of the Council of Europe.[122]

The demands arising from the Convention created in each member country some level of national preventative mechanism, representing a remarkable force in the combat against torture. The proper application of these mechanisms is regularly checked by the Committee. Under the framework it has the possibility to access information related to numbers of detainees, location of detention, circumstances and conditions of their treatment. If states fail to provide information the Committee may be alarmed, and may critically access these facilities by *ad hoc* visit besides the periodic control. The employees have an additional liberty to interview the detainees in private and get accurate and relevant information.[123] The places which are visited are police stations, detention facilities, prisons, correctional institutions but also social care homes, psychiatric hospitals or detentions for foreigners, such as migrant camps.[124]

Although the rigidity of the interpretation of what constitutes torture was shaken after the terrorist attacks in 2001, and the emergence of the "war on terror", the work of the Committee was since its establishment continuous and necessary. The pressure incoming mainly from the Unites States of America created the demand even from European countries to reopen the interpretation of the notion of torture since then. The work of the Committee is thus a part of a very complex institutional, normative and political cast. However, there is no doubt that the mere creation of such institution not to mention its periodic work plays a major

[121] The United Nations Standard Minimum Rules for the Treatment of Prisoners. The Nelson Mandela Rules. General Assembly Resolution 70/175. Annex. Adopted 17 December 2015.
[122] See Wrońska, I. *The political position of the executive in Poland in the aspect of the execution of judgments of the European Court of Human Rights – selected issues*, Bialostockie Studia Prawnicze, Vol.20, 2016.
[123] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, U.N.T.S. 126, 28. September 1983, Art. 20.
[124] Gnatovskyy, M. Council of Europe Prevention. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: Fighting for Human Dignity in Europe. In Albano, A. Robert, D. Palma, M.: Nelle mani altrui, Da dove, Vol. 4, Roma : Stamperia romana SRL, 2022. p. 301.

role in shaping and influencing the application of obligations stemming from Art. 3 of the ECHR.

2.1.3. Work of the Committee

The CPT has a unique mandate to perform unannounced visits to place of detention under the jurisdiction of state parties. Moreover, the work of the CPT is not limited to Europe as is extends to the overseas territories where member states exercice authority, and observe in some cases, on the basis of an agreement entered into force between the Council of Europe and an external governmental body. The UN Interim Administration Mission in Kosovo in 2004 in relation to the UN detention facilities and the Kosovo force facilities.[125]

As the CPT is a quasi judicial organ and not a fact-finding body it generally distances itself from the language of Art. 3. First of all, the body aims to continue to act as a preventive mechanism sending powerful "red flags" to places where violations may have occurred. It distances itself from deciding regarding claims, which is generally the job of the ECtHR. As such, the CPT is using the terms as alleged violations, putting emphasis on the word of alleged, and likewise is not making any distinction between the notions included in the "group of torture", i.e. torture, inhuman and degrading treatment. On the contrary the CPT generally refers to the term ill-treatment focusing rather on the dialogue than on the exact terminology.[126] Hence, the *in situ* work of the CPT is extensive and influential, nonetheless the author found it more proper to refer to the investigations of the CPT as "work of the CPT" and not as the case-law of the CPT.

The first general report from year 1993 represents the starting point of the work of the CPT. It enhances the initial observations of the CPT regarding the situation in detention facilities in European countries. The findings of the first visits presented that there are various issues in detention facilities. Italian and Greece had issues with overcrowding of the facilities, which lead to numerous violations of rights of prisoners regarding their access to healthcare and their general well-being. In Bulgaria and Turkey CPT found that sanitary conditions were proven to be insufficient, leading to increased health risks and the deterioration of dignity of detainees. The issue of excessive use of force by law enforcemenet personnel during arrest and further detention were observed in United Kingdom and Mexico. Furthermore, Spain and

[125] UN Security Council resolution No. 1244, 10 June 1999.
[126] Bicknell, Ch. Evans, M. And Morgan, R. *Preventing Torture in Europe*, Council of Europe, 2018, p. 73.

Poland had issues with prolonged isolation and solitary confinemen having negative psychological impact on prisoners.[127]

A noteworthy report on the prison conditions in Romania was presented in 2001. The CPT during its visit founded various issues which violated Art. 3 of the ECHR. The prisons were generally overcrowded leading to inhumane living conditions of the inmates. The CPT reported the alarming conditions related to poor sanitary conditions, based on insufficient access to clean water, sanitation and basic health services. However, the most problematic proved to be evidences of physical abuse performed by prison staff on prisoners. Based on the findings, the CPT created a recommendation report which followed political pressure from the UN and the media. This lead to considerable adjustments of the detention system, including policy reforms and initiatives with the goal to improve the conditions in these facilites.[128]

The most influential visits of the CPT are known from 2016 from Hungary, where the CPT raised serious concernes related to the treatment of detainees and called to take urgent measures;[129] from Greece in 2017, where the CPT observed the poor sanitary conditions as well as inadequate healthcare provisions;[130] from Switzerland in 2016 where there was evidence of inhuman treatment during restraint of detainees[131] or from Bulgaria in 2019 where proof of physical abuse as well as poor conditions in detention facilities were observed.[132] Overally, the CPT and its work contributed to a broader understanding of illicit treatment and promoted reforms in the European region frequently.

[127] European Committe for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1st General Report on the CPT's activites covering the period November 1989-December 1990, 1991.
[128] Ad hoc visit to Romania of the European Committe for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 22-26. October 2001, CPT/Inf/2004/8, 2004.
[129] Ad hoc visit to Hungary of the European Committe for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 21-27. October 2015, CPT/Inf/2016/27, 2016.
[130] Ad hoc visit to Greece of the European Committe for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in 2016, CPT/Inf/2017/25, 2017.
[131] Periodic visit to Switzerland of the European Committe for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in 13-24.April.2015, CPT/Inf/2016/18, 2016.
[132] Ad hoc visit to Bulgarua of the European Committe for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 10-17. December 2018, CPT/Inf/2019/24, 2019.

2.2. European Union Framework

2.2.1. Legislative framework

The European Union (EU) demonstrates its commitment to human rights protection through its foundational document, the Treaty on European Union (TEU).[133] Art. 2 of the TEU states that the EU is built on core values, including human dignity, freedom, democracy, equality, the rule of law, and respect for human rights.[134] This provision highlights the significance of human rights within the framework of EU institutions. Another key document is the Charter of Fundamental Rights of the European Union, commonly referred to as the Nice Charter.[135] With the same legal standing as the EU Treaties, as stipulated in Art. 6 of the TEU, Art. 4 of the Nice Charter explicitly prohibits torture, inhuman, or degrading treatment or punishment, thereby binding all EU member states to this principle. [136]

In addressing the issue of torture, it is crucial to first recognize the actions taken by the EU in this area, which can be categorized into internal and external initiatives. Internally, the focus is primarily on judicial cooperation in criminal matters, as well as issues surrounding asylum laws and refugee status. This judicial cooperation involves harmonizing and aligning the regulations related to the prohibition of torture across member states. EU institutions have the authority to create rules that establish a legislative minimum for the crime of torture, including its definition and associated penalties. Moreover, these institutions mandate that member states incorporate the crime of torture into their domestic laws, reinforcing the obligation to adhere to the ECHR and the UNCAT.[137] This approach illustrates the EU's dedication to ensuring that member states uphold human rights standards and fulfill their commitments to preventing torture and inhumane treatment, thus reinforcing the broader framework of human rights protections within the Union. The author will subsequently analyze the interpretations of the prohibition of torture as reflected in the jurisprudence of the

[133] Treaty on European Union, Official Journal of the European Union no. C326/13, entered into force 26 December 2012.
[134] Ibid, Article 2.
[135] Charter of Fundamental Right of the European Union, Official Journal of the European Union no. C364/1, entered into force 18 December 2000.
[136] Moravcová, D. Prejudiciálne konanie vo veci Mirin-medzi pravidlami vnútorného trhu a ľudskými právami, Právo a manažment v zdravotníctve, Vol. 15/9, 2024, p.11; Article 4 of the Charter of Fundamental Right of the European Union reads as follows*: „No one shall be subjected to torture or to inhuman or degrading treatment or punishment“.*
[137] Kotzur, M. Article 83 (Criminal offences with a cross-border dimension) TFEU. In Geiger, R., and Khan, D-E.: *European Union Treaties, Treaty on European Union, Treaty on the Functioning of the European Union, Charter of Fundamental Rights of the European Union*, Munchen, C.H. Beck, 2015, p. 448.

Court of Justice of the European Union ("CJEU"), further exploring the implications of this legal framework.

While the EU states, in its European Arrest Warrant that it allows for the suspension of arrest warrant mechanisms in cases of serious and persistent breaches by member states, it does not explicitly provide a framework for refusing to extradite an individual to a member state where there are significant concerns that the person may face ill-treatment. Art. 3 and Art. 4 of the European Arrest Warrant outline both mandatory and optional grounds for the non-execution of the warrant, but the list does not encompass explicit mentions of torture or other forms of ill-treatment. Nonetheless, it is essential to interpret this framework decision in light of the EU's primary legal sources, which assert that fundamental legal principles and rights cannot be compromised or circumvented by either the framework decision itself or by the decisions of judges implementing it. As a result, when facilitating the extradition of an individual, it is imperative to adhere to both binding fundamental conventions the ECHR and the Nice Charter. This adherence implicitly requires the application of Art. 3 of the ECHR, as well as Art. 4 of the Nice Charter, enshrining similar protection. By ensuring compliance with these conventions, the EU reinforces its commitment to safeguarding fundamental human rights, even within the context of judicial cooperation and the execution of arrest warrants. [138]

It is crucial to mention Art. 18 and Art. 19 of the Charter, emphasizing the right to asylum as a crucial aspect of limitation on removal, expulsion, or extradition actions, specifically prohibiting such actions when there exists a serious risk of the individual facing the death penalty or other forms of ill-treatment. A significant focus is placed on the mechanisms within member states designed to assess the conditions of the country to which an individual may be deported. This assessment involves several criteria aimed at preventing the misuse of asylum claims to secure protected status. However, the effectiveness of these mechanisms can be influenced by the Dublin II Regulation[139] and the pertinent case law established by the CJEU, which will be discussed in more detail later.[140]

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[138] See Reports from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 2005 and 2006.

[139] See Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, 2003.

[140] Morgade-Gil, S. *The Discretion of States in the Dublin III System for Determining Responsibility for Examining Application for Asylum. What Remain of the Sovereignty and Humanitarian Clauses After the Interpretation of the ECtHR and the CJEU?,* International Journal of Refugee Law, Vol. 23, Issue 3, 2015, p. 437.

Regarding the EU's external actions, the General Affairs Council established guidelines in 2001 for EU policy toward third countries concerning torture and other cruel, inhumane, or degrading treatment or punishment. These guidelines complement the EU's earlier 1998 Guidelines on the Death Penalty. Their purpose is to provide a framework for EU institutions and member states as they confront issues of ill-treatment in third countries. In this context, the guidelines seek to extend the protection of international human rights beyond the borders of the EU, highlighting the need for global accountability. The guidelines also address the activities of specialized working groups tasked with reporting on and analyzing instances of torture occurring outside the EU. These groups aim to identify and implement potential preventive mechanisms and strategies. Their goal is to introduce effective measures that uphold the prohibition of torture while ensuring that victims have access to necessary rehabilitation services and legal support. The guidelines delineate tools that carry both political and financial implications, although they do not explicitly categorize them as such. They encompass a variety of actions, including dialogue, monitoring, assessments, and reporting, as well as diplomatic demarches and statements, site visits, trial observations, and collaborations with multilateral organizations. Additionally, bilateral and multilateral cooperations, which may include financial assistance, are highlighted. [141]

In line with these efforts, a Council Regulation from 2016 introduced the possibility of employing trade restrictions as a mechanism to prevent and combat ill-treatment in select countries. [142] Furthermore, it is important to acknowledge the Regulation established in 2005, which pertains to the trade of goods that could be utilized for capital punishment, torture, or other cruel, inhumane, or degrading treatment.[143] This regulation represents the first multilateral instrument of its kind, carrying a binding force and ensuring direct applicability across all member states. Its primary objective is to regulate the trade in human rights violations-related equipment, thereby establishing a framework for greater oversight and control over practices that may contribute to human rights abuses. Through these measures, the EU seeks to not only bolster its own human rights standards but also to promote and protect human dignity on a global scale by controlling the *business of human rights*.[144]

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[141] Guidelines on EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment , No. 12107/20, 2019, Revision of the Guidelines.

[142] See Regulation (EU) 2019/125 of the European Parliament and of the Council concerning trade in certain goods which could be used for capital punishment, torture or other cruel inhuman or degrading treatment or punishment, 2016.

[143] Ibid.

[144] Picchi, M. *Prohibition of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: some remarks on the operative solutions at the European level and their effects on the Member states. The case of Italy*, Criminal Law Forum, Vol. 28, 2017. p. 753.

2.2.2 Case-Law of the CJEU

The case law of the CJEU plays a crucial role in interpreting the provisions concerning the prohibition of torture within the context of EU policies, while aligning closely with the jurisprudence of the ECtHR. The CJEU has made it clear that member states operate under a rebuttable presumption, rather than an absolute one, regarding respect for fundamental rights.[145] This means that while there is an inherent assumption that states will uphold fundamental rights, this presumption can be challenged by contrary evidence. This principle is particularly relevant when considering the transfer of asylum seekers from one member state to another. Influenced by the case law of the ECtHR,[146] the CJEU stipulates that such transfers are prohibited if there are well-documented issues within the asylum procedures of the destination country, especially when there is a clear risk of ill-treatment for the individual involved. In these situations, the state currently hosting the asylum seeker bears the responsibility to thoroughly assess the individual's application, ensuring that their human rights are not violated.

Furthermore, regarding asylum applicants, the CJEU has ruled that individuals can only contest asylum decisions in the country of first entry into the EU, particularly if systemic deficiencies in the asylum system have been established. This serves to streamline proceedings and address concerns about fairness in the handling of asylum claims. [147] In the context of subsidiary protection, it is essential to note that applicants are not required to prove targeted threats against themselves in countries known for serious risks to life, such as those ruled by dictatorial regimes, experiencing armed conflict, or under the threat of terrorism. The mere presence of a generalized threat in a given country is sufficient to establish a substantial risk to the life of a civilian returning to that environment. This understanding reinforces the protective framework for individuals fleeing dangerous circumstances and underscores the EU's commitment to safeguarding human rights for asylum seekers, regardless of the specific nature of the threats they may face. Through these interpretations, the CJEU not only honors the principles established by the ECtHR but also strengthens the legal framework for human rights protections within the European Union.[148]

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[145] See CJEU, N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, Judgment, Joined Cases C- 411/10 and C-493/10, 21 December 2011.
[146] See ECtHR, MSS v. Belgium and Greece, Application No. 30696/09, Judgment, 21 January 2011.
[147] See CJEU, Shamso Abdullahi v. Bundesasylamt, Case C-394/12, Judgement, 10 December 2013.
[148] See CJEU, Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie, Case C-465/07), Judgement, 17 February 2009.

The right to subsidiary protection concerning fears of ill-treatment has been a significant issue in numerous cases before the CJEU. In the notable case of M'Bodj and Abdida in 2014, the CJEU ruled that asylum seekers suffering from serious health problems could not claim the right to asylum or subsidiary protection under qualification directives. This decision stemmed from the fact that, while one basis for seeking such protection involved the real risk of ill-treatment in the country to which the applicants were being sent back, the Court concluded that the applicants did not sufficiently demonstrate that their cases warranted such protection. The rationale provided by the CJEU was rooted in the understanding that subsidiary protection is primarily intended to shield applicants from harm inflicted by individuals. When making their claims, the applicants argued that inadequate medical treatment should be classified as ill-treatment. However, the Court found this argument unconvincing, stating that the standard for qualifying for protection was not met in their cases.[149]

As previously highlighted, when issuing a European Arrest Warrant, authorities are required to take into account the conditions under which the warrant will be executed. The interpretation of torture in the context of such arrest warrants was examined in the cases of Aranyosi and Caldararu. In these rulings, the CJEU explored the limits of mutual trust between member states and underscored the duty of the executing authority to conduct thorough due diligence. These cases brought to light issues concerning prison conditions in Hungary and Romania, prompting the Court to assert that if the executing authority identifies a potential risk of rights violations, it must seek additional information and may need to suspend the execution of the warrant. Moreover, the Court reiterated the absolute nature of the prohibition outlined in Art. 4 of the Charter. This reinforces the idea that protections against torture and inhumane treatment are non-negotiable, emphasizing the vital importance of safeguarding fundamental human rights within the framework of EU law. Collectively, these cases demonstrate the ongoing need to ensure that judicial processes respect individual rights, particularly in scenarios where individuals face the risk of ill-treatment upon extradition or return to their home countries. [150]

In its recent case law, the CJEU has significantly expanded the protection afforded to asylum seekers under the non-refoulement principle, as illustrated in the 2018 case of NS v. UK and Ireland. This case involved a national of Sri Lanka who arrived in the United

[149] See CJEU, Mohamed M'Bodj v État belge; Case of Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussa Abdida, Case C-542/13, Judgement, 18 December 2014.
[150] CJEU, Pál Aranyosi and Robert Caldararu v Generalstaatsanwaltschaft Bremen, Joined Cases C-404/15 and C-659/15, Judgement, 5 April 2016.

Kingdom in 2005 as a student. The applicant asserted that he had previously been a member of the Liberation Tigers of Tamil Eelam and had endured detention and torture at the hands of Sri Lankan security forces. He expressed a genuine fear of facing similar ill-treatment should he be forced to return to his home country. To support his claim, the applicant provided medical evidence indicating that he was suffering from post-traumatic stress disorder and depression as a direct result of the traumatic experiences he had faced in Sri Lanka. He further argued that upon his return, he would not receive the necessary medical care to address his mental health issues, thereby exacerbating his condition. In this case, the CJEU held that an individual who has previously been tortured in their country of origin qualifies for subsidiary protection if there is a credible risk of being deliberately denied adequate physical and psychological healthcare upon return. This ruling underscores the Court's commitment to human rights standards, emphasizing that the potential for ill-treatment extends beyond physical harm to include the denial of necessary medical treatment for those who have suffered severe trauma. The implications of this decision are significant, as they reflect a broader understanding of the vulnerabilities faced by asylum seekers and the need for comprehensive protection mechanisms. By recognizing the importance of mental health care in the context of non-refoulement, the CJEU reinforces the necessity for member states to uphold their obligations under international law, thereby ensuring that individuals are not returned to situations where their well-being would be at risk. This landmark ruling is a critical step towards enhancing the legal framework surrounding asylum seekers and further illustrates the evolving nature of human rights protections within the European Union. [151]

2.3.Concluding remarks on the European human right system

The chapter has intricately explored the complex dynamics surrounding the prohibition of torture within the European legal framework, revealing the foundational principles and mechanisms that have been established to safeguard human rights throughout the continent. Initially, it is noteworthy that while the right to life is often regarded as the supreme human right, the prohibition against torture holds even more critical position in specific contexts. This absolute principle is enshrined in various important legal texts, including probably the most effective one, the ECHR, the document, which articulates clear obligations for state

[151] See CJEU, N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, Joined Cases C-411/10 and C- 493/10, Judgment, 21 December 2011.

parties to respect and promote the dignity and integrity of all individuals, regardless of their background or circumstances.

Landmark cases of the ECtHR, such as Ireland v. the United Kingdom and Gäfgen v. Germany, exemplify the significant influence that judicial interpretation holds in defining the parameters of acceptable treatment under both national and international law. These rulings have elucidated that the threshold for identifying torture must be treated with utmost seriousness, necessitating a meticulous examination of the unique circumstances that characterize each case.

Moreover, the legal framework is further reinforced by the establishment of preventive mechanisms, such as the European Convention for the Prevention of Torture and the corresponding European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The ECtHR together with the Committee actively monitor the conditions within detention facilities, ensuring that member states comply with their human rights obligations. Their ongoing work reflects a profound dedication to eradicating torture and enforcing the inherent rights of individuals, highlighting the importance of vigilance and accountability in human rights practices.

However, despite the positive strides that have been made, significant challenges remain in the realm of torture prevention and human rights protection. The intricacies involved in the interpretation of torture, particularly as it relates to various jurisdictions and legal frameworks, invite ongoing debate and scrutiny from legal scholars and practitioners alike. The absence of explicit definitions that distinguish torture from other forms of cruel or degrading treatment within several international conventions creates ambiguities that may undermine enforcement efforts. Furthermore, the application of these protections can sometimes be overshadowed by political pressures, where states may invoke national security concerns as justifications for actions that contravene the prohibition on torture.

In conclusion, the journey toward establishing a comprehensive prohibition against torture within the European legal framework represents a significant achievement for advocates of human rights as well as for non-governmental human rights fighters. The European body of law has established critical standards while reinforcing the commitment to uphold the inherent dignity of all individuals. It is imperative that moving forward, the European legal system effectively addresses existing gaps and refines definitions to ensure strong protection against torture and inhumane treatment for everyone, irrespective of their status.

The collective efforts of the member states of the region, alongside proactive judicial interpretations, will be pivotal in nurturing a culture of accountability and respect for human rights across Europe and beyond. As the fight against torture evolves, it is essential that the commitment to maintain the highest standards of human dignity remains central to legal and political dialogues within the region. The progress thus far has established a firm foundation, however, there is still much work to be done. The ongoing challenge is not merely to enshrine rights in legislation but to activate these rights through diligent enforcement, fostering a legal environment where the inviolability of human dignity is not just recognized but actively defended and upheld. Through these efforts, the European legal framework can serve as a beacon of hope and protector of human rights, championing the dignity and well-being of every individual without exception.

III. Torture under the Inter-American legal and judicial framework

In general, individuals who experience limitations on their personal freedom and are under some form of surveillance of others, are inherently more vulnerable. Addressing these circumstances has become essential due to the alarming prevalence of involuntary disappearances, which often subject individuals to severe violations of their physical integrity.[152]

Given the extensive scope of the prohibition on torture, the upcoming chapter will specifically examine the Inter-American system for the protection of human rights, which has been in place in the Americas since 1948. This system was established through the Organization of American States („OAS"), created by the Charter of the Organization of American States signed in Bogota in that same year. Recognized as a regional intergovernmental organization as per Article 52 of the United Nations Charter, the OAS currently operates its headquarters in Washington, D.C., and includes 35 member states, such as the United States and Canada.

The primary mission of the OAS is to promote safety, uphold democratic values, and facilitate the peaceful resolution of disputes across the American continent. It serves as a crucial platform for member states to collaborate on issues related to human rights, security, and regional stability. Through its various mechanisms and instruments, the OAS aims to address human rights violations, including torture, and to provide a framework for protecting individuals' rights in the face of governmental power. This examination of the Inter-American system will shed light on how it navigates the complexities of human rights protection and its efforts to combat torture and ill-treatment in the region.[153]

The Charter of the OAS not only serves as the foundational document for the organization but also outlines essential human rights and fundamental freedoms, emphasizing values such as the respect for individual rights and adherence to moral and ethical principles.[154] However, it is important to note that specific rights, including the prohibition of torture, are not explicitly articulated within the Charter itself. This omission can be attributed to the Charter's purpose of establishing fundamental conditions for cooperation among member states as public entities, wherein the states committed to upholding individual rights and

[152] Hassanová, R.L. *Prohibition of torture in the framework of Inter-American system for the protection of human rights*, Slovak Yearbook of International Law,Vol. XII, 2022, p. 111.
[153] Article 2 of the Charter of the Organization of American States, opened for signature 30 April 1948, No. 1609, entered into force 13 December 1951.
[154] Ibid. Art. 17.

universal moral principles in a broad and general manner. Recognizing the need for stronger legal framework that explicitly protects individual human rights, the OAS member states sought to create a context in which these rights could be effectively promoted and enforced. To this end, the OAS has developed several binding documents aimed at enhancing the legal structure surrounding human rights, including the Inter-American Democratic Charter, the Social Charter of the Americas, the American Convention on Human Rights, and the Inter-American Convention to Prevent and Punish Torture.

The subsequent chapters will delve into the prohibition of torture within the context of the Inter-American human rights system. It is noteworthy that the United Nations Convention Against Torture is applicable to the OAS member states. While this international treaty addresses issues beyond the regional scope of the Americas, its interpretation and application hold significant relevance within the Inter-American context. This broader applicability underscores the importance of a cohesive understanding of human rights protections, particularly regarding the prohibition of torture, as it resonates not only within the American region but also in the global dialogue on human rights. Through this exploration, the analysis aims to highlight the mechanisms in place to combat torture and reinforce the commitment of OAS members to uphold human rights and dignity across the region.

3. 1. American Convention on Human Rights

Article 5. Right to Humane Treatment

„1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
3. Punishment shall not be extended to any person other than the criminal.
4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.
5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.
6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.“[155]

[155] American Convention on Human Rights, opened for signature on 22 November 1969, No. 17955, entered into force 18 July 1978.

The framework of rights intended to encapsulate the fundamental rights recognized by the OAS was introduced in 1948 during the adoption of the American Declaration of the Rights and Duties of Man in Bogota. This foundational document is the first of its kind and is non-binding in nature, drawing on principles of natural law, which root its provisions in the moral and ethical standards intrinsic to humanity. The Declaration comprises a preamble followed by two chapters, which collectively outline a diverse array of civil, political, economic, social, and cultural rights and freedoms. A key focus within this Declaration is placed on the principles of human equality and the inherent dignity of all individuals. It is clear that this Declaration has played a pivotal role in shaping the foundational ideas that ultimately informed the development of the American Convention on Human Rights, which built upon the essential principles articulated in this earlier document.[156] As such, the American Declaration not only established a framework for understanding and advocating for human rights within the Americas but also provided a crucial building block for the creation of more detailed and binding legal protections in the subsequent American Convention. In doing so, it laid the groundwork for a regional commitment to uphold the dignity and rights of individuals throughout the member states of the OAS, marking a significant milestone in the ongoing pursuit of human rights in the region.

In 1969, during a session held in San Jose, the members of the OAS rendered the American Convention on Human Rights, commonly known as the "Pact of San Jose," a binding and enforceable document being part of the Inter-American Charter's legal framework. The treaty proclaimed one of its primary responsibilities to be the protection of rights enshrined within the Charter.

In the Pacts Art. 5 the text explicitly prohibits torture, framed under the title "Right to Humane Treatment." The first paragraph of this article safeguards the physical, mental, and moral integrity of all individuals.[157] Furthermore, in the subsequent section, which addresses the context of the victim's deprivation of liberty, there exists a standard categorization of torture alongside cruel, inhuman, or degrading punishment and treatment. While it is commonly accepted that these concepts are often grouped together, a pertinent question arises regarding the appropriateness of classifying all these actions under one ius cogens norm.

International jurisprudence has introduced some differentiation between these terms. Although numerous cases frequently explore and clarify the distinctions among these notions,

[156] American Declaration of the Rights and Duties of Man, opened for signatures 2 May 1948, Organization of American States resolution n. XXX, entered into force 19 July 1978.
[157] American Convention on Human Rights. Art. 5. (1): *„Every person has the right to have his physical, mental, and moral integrity respected.“*

setting precedents for future application, the interpretations remain specific to individual cases and can result in significant variances in their implementation across different states. This discrepancy highlights the complexities involved in applying these interpretations universally and raises important considerations about how the rights outlined in the Pact of San Jose are upheld and enforced within various legal systems throughout the Americas. Such analyses underscore the ongoing need for clear frameworks and consistent applications of human rights protections to ensure the integrity and dignity of individuals, particularly in contexts where abuses might occur.[158]

In the third subsection of Art. 5, it is clearly stated that punishment may only be applied to individuals who have been convicted of a crime. Consequently, the pre-trial detention of a person who has not yet been found guilty cannot be classified as punishment. Instead, this form of detention is viewed as a procedural measure that serves preventive purposes; it must be justified by evidence indicating that the accused might engage in further criminal activity, exert influence over witnesses or victims, or flee to evade prosecution. [159] The further subsection is closely linked to the previous one, emphasizing that accused individuals who are detained must be kept separate from those who have already been convicted. This separation implies that their treatment must differ and be appropriate for their status as unconvicted individuals. Both provisions are rooted in the principle of the presumption of innocence, which asserts that individuals should be treated as innocent until proven guilty.[160]

The fifth subsection focuses specifically on the special protections afforded to minors, emphasizing that they require an increased level of safeguarding that reflects the specific nature of their cases. Proceedings involving minors are to be conducted in specialized tribunals and should be expedited as much as possible. In addition, the treatment of minors during these proceedings must adhere to supplementary requirements that take into account their age.[161] Importantly, the imprisonment of a child is to be regarded only as an *ultima ratio* measure, and any deprivation of liberty must occur in separate facilities from adults unless it

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[158] Ibid. Art. 5. (2): *„ No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.“*

[159] American Convention on Human Rights. Art. 5. (3): *„Punishment shall not be extended to any person other than the criminal.“*

[160] Ibid. Art. 5. (4): *„Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.“*

[161] Ibid. Art. 5. (5): *„Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.“*

is deemed to be in the child's best interest to do otherwise.[162] This raises an important question regarding whether there should be a similar emphasis within human rights conventions such as the Pact of San Jose, on enhancing protections for elderly individuals or those who are ill. Conversely, it is worth considering whether emphasizing the protection of young people should hold unique significance, to the point of explicitly mentioning it in Art. 5, which could inadvertently diminish the focus on the rights of other vulnerable groups. These discussions highlight the ongoing need to balance the rights and protections afforded to various populations while ensuring that all individuals, regardless of age or health status, are treated with dignity and fairness within the legal framework.

The final subsection addresses the interpretation of the purpose behind the deprivation of liberty as a form of punishment. It asserts that the fundamental objective of such punishment is to facilitate the reform and social reintegration of the prisoner. [163] From this perspective, it is evident that incarceration, for a duration determined by the court, should not merely be seen as a punitive measure but rather as a means of enabling retribution and reconciliation with society. The principle of *„punitur, quia peccatum est,"* which translates to punishment being inflicted solely because a crime has been committed, should not serve as the primary aim of the justice system. In relation to the prohibition of torture, this section underscores the idea that punishment is not intended to inflict mental or physical suffering on the offender; rather, it aims to modify their behavior and assist in their reintegration into the community. Therefore, incorporating such a provision into human rights conventions is both reasonable and essential. Additionally, numerous scholars highlight the benefits associated with adopting a restorative justice system, which prioritizes healing and reconciliation over mere retribution. [164]

The language within these subsections of the article regulates various rights and principles concerning the personal inviolability of individuals. With a positive formulation of the right to respect for one's physical, mental, and moral integrity, it is complemented by prohibition against torture or any form of cruel, inhuman, or degrading treatment or punishment. The concept of the right to humane treatment, as articulated in the Pact of San Jose, reflects ideas that have been developed through the work of the Inter-American Commission on Human Rights. Unlike the more general and less specific wording found in

[162] Article 37 of the Convention on the Rights of the Child, 1989.
[163] Ibid.. Art. 5. (6): *„Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners."*
[164] Strémy, T. Kurilovská, L. Vráblová, M. *Restoratívna Justícia*, Praha: Leges, 2015, p. 22

Art. 5 of the Universal Declaration of Human Rights[165] or the slightly more detailed articulation in Art. 7 of the ICCPR, [166] the language in the Pact of San Jose offers a clearer and more comprehensive understanding of these vital human rights principles. This clarity helps to ensure that the emphasis is placed not only on prohibiting violence and mistreatment but also on guaranteeing the dignity and rehabilitation of all individuals within the justice system.

Nevertheless, in the author's view, as previously discussed within this chapter, there are numerous aspects of Art. 5 of the Pact of San Jose that could present challenges, particularly related to its various subsections. These subsections provide for special considerations for individuals with specific statuses, which can result in ambiguous interpretations. Given the ius cogens nature of the prohibition against torture, the author argues that it may be unnecessary and potentially inappropriate to include detailed subsections that explicitly outline the scope of this prohibition within the framework of Inter-American human rights law. The inclusion of such specifics could complicate the understanding of fundamental rights and may inadvertently lead to inconsistencies in their application across different contexts. Instead, the emphasis should remain on the overarching principles that uphold the prohibition of torture, ensuring a clear and unequivocal stance against any form of ill-treatment. By maintaining a focus on the core tenets of human rights protections, the law can better fulfill its purpose of safeguarding individuals from harm while avoiding potential pitfalls associated with overly detailed legal provisions. This approach encourages a consistent application of the prohibition against torture, reinforcing its absolute nature within the framework of human rights in the Americas.

3.2. Inter-American Convention to Prevent and Punish Torture

The Inter-American Convention on the Prevention and Punishment of Torture (commonly referred to as ACAT or the American Convention against Torture) was adopted on December 9, 1985, and officially came into effect in 1987. To date, it has been ratified by 18 member states of the OAS. Its primary objective was to establish a clear definition of torture within the American legal framework, drawing upon the earlier determinations made

[165] Universal Declaration of Human Rights, 1948. Art. 5: *„No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment“.*
[166] International Covenant on Civil and Political Rights, 1996. Art. 7: *„No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.“*

by the Commission regarding the prohibition of torture pursuant to the provisions outlined in the Pact of San Jose. The Inter-American Juridical Committee was tasked with drafting the text of the convention, ensuring that it aligned with the region's legal standards and human rights principles.[167]

The ACAT is universally deemed as a significant instrument in the ongoing effort to prevent and punish torture in the Americas, reinforcing the commitment of member states to uphold human rights and provide legal mechanisms for accountability and protection. Regarding its textual backgound the initial intention was for the ACAT to frame the notion of torture as an international crime.[168] However, in the final version of the convention, all references to the classification of torture as an international crime were removed. This alteration highlights the complex negotiations and discussions that shaped the final text, reflecting both the challenges and priorities of member states in addressing this critical issue. The definition of the torture based on the Art. 2. of the ACAT is therefore reads as follows:

"For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish."[169]

According to the definition provided, certain elements must be satisfied in order to categorize specific acts as constituting the crime of torture. The foundational principles dictate that the action in question must be intentional and result in physical or mental pain or suffering. Additionally, the definition specifies that such acts must serve a particular purpose. Some of the purposes listed include criminal investigation, intimidation, punishment, preventive measures, or penalties. However, the use of the phrase *"or for any other purpose"* indicates that there may be other motivations for committing acts of torture beyond those explicitly enumerated. Interestingly, this definition does not reference cruel, inhuman, or

[167] Rodley, N. S. *The Treatment of Prisoners Under International Law*, Paris: UNESCO, Oxford: Clarendon Press, 1987, p. 49.
[168] See Draft of the ACAT of the 8.regural session of the OAS General Assembly, N. AG/RES. 368 (VIII-0/78).
[169] Article 2 of the Inter-American Convention to Prevent and Punish Torture, opened for signature on 9 December 1985, Organization of American States Treaty Series n. 67, entered into force 28 February 1987.

degrading treatment or punishment, a common feature in many other legal instruments that address the prohibition of torture. In the second part of the article, it is clarified that physical or mental pain or suffering that can be viewed as a natural outcome of lawful measures does not meet the criteria for the crime of torture. This implies that actions taken by law enforcement or police are deemed legal when they are grounded in law, officially carried out, and proportionate to the intended objectives. The coercive methods employed by police and within detention facilities are typically confined to those specifically outlined in the national legislation of the respective state. This delineation serves to clarify the boundaries between acceptable law enforcement practices and actions that constitute torture, thus contributing to the efforts to establish clear legal standards and protections against the misuse of power in the context of law enforcement and criminal justice. [170]

Art. 10 of the ACAT explicitly prohibits the use of evidence obtained through acts of torture. In contrast, Art. 8(3) of the Pact of San Jose utilizes the term "evidence obtained by coercion of any kind," which may allow for a broader interpretation and application regarding the admissibility of evidence. This distinction suggests that the Pact responds to actions that might also be classified as cruel, inhuman, or degrading treatment. [171]

Additionally, various obligations are directly linked to national criminal law and primarily focus on the need to harmonize criminal procedure rules concerning the investigation of torture offenses. Both torture and attempted torture must be designated as crimes subject to stringent penalties.[172] Legislation should adequately support cases involving torture perpetrated within the state's territory, acts committed by a citizen of the state, or instances where the victim is a citizen of the state, provided that it is deemed reasonable to apply such laws. This is achieved through both territorial jurisdiction and active as well as passive personal jurisdiction.[173] Moreover, the ACAT clarifies that an individual cannot invoke superior orders as a justification for committing acts of torture, thus, they remain

[170] Hašanová, J. Použitie zbrane príslušníkom Policajného zboru v cestnej premávke. In Kurilovská, L. et al.: *Aplikačné aspekty vykonávania služobných zákrokov*, 2019, p. 68.
[171] American Convention on Human Rights. Art. 8(3): *„A confession of guilt by the accused shall be valid only if it is made without coercion of any kind."*
[172] Inter-American Convention to Prevent and Punish Torture, 1985. Art. 6.: *„The States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature."*
[173] Ibid. Art. 12.*:" Every State Party shall take the necessary measures to establish its jurisdiction over the crime described in this Convention in the following cases: a.When torture has been committed within its jurisdiction; b.When the alleged criminal is a national of that State; or c. When the victim is a national of that State and it so deems appropriate."*

legally responsible for their actions.[174] Art. 8 also mandates that states ensure the right to an impartial investigation into allegations of torture. Importantly, if there are suspicions that torture has occurred, the state is required to take action without waiting for a formal notification from the victim, initiating an investigation *ex officio*.[175] This proactive approach reinforces the commitment to addressing and preventing torture, ensuring that victims receive the necessary attention and justice while holding perpetrators accountable for their actions. Such provisions are crucial for maintaining the integrity of human rights protections and reinforcing the legal framework that governs the treatment of individuals within the justice system.

We might shortly mention the connection to the non-refoulement principle, even though it will be discussed in later chapters more thoroughly. The principle frequently arises in court cases involving the definition of torture. Art. 13 of the ACAT stipulates, that an individual cannot be extradited or returned to a country if there are sufficient grounds to believe that such an action would pose a threat to their life or expose them to torture or cruel, inhuman, or degrading treatment. Additionally, it emphasizes that the individual should not be subjected to a special trial in the requested state. At first glance, this provision may not seem extraordinary. However, a significant point of contention arises with the phrase “he will be tried by special or *ad hoc* courts.” This raises the question of whether institutions like the International Criminal Tribunal for the former Yugoslavia or the International Criminal Tribunal for Rwanda would fall under the definition of special tribunals. The implications of this categorization necessitate further exploration and interpretation of what is meant by "special or *ad hoc* courts or tribunals." This nuanced understanding is critical in ensuring that the principles of non-refoulement are consistently applied in a manner that protects individuals from the risk of encountering situations that may violate their rights, particularly in the context of extradition processes. By clarifying these definitions, we can better safeguard the rights of individuals facing potential return to jurisdictions that may not uphold fundamental human rights standards. Nevertheless the interpretation of what constitutes special or ad hoc courts in the American understanding, can be analyzed through the case law of the Inter-American Court of Human Rights („IACHR“) or the Commission. This refinement in the definition of non-refoulement in relation to the ACAT is noteworthy, as it

[174] Ibid. Art. 4.: „*The fact of having acted under orders of a superior shall not provide exemption from the corresponding criminal liability.“*

[175] Ibid. Art. 8.: *„Likewise, if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process.“*

can potentially create barriers to any request for extradition, even when the individual would face a trial deemed legally admissible in a special court setting. [176]

3.3. Case- law of the system

Having explored some fundamental elements and issues related to the topic of torture within the Inter-American human rights framework, this section will delve into significant cases that address this critical issue.

The IACHR stands as the sole judicial body within the American human rights system, with the vital responsibility of applying and interpreting the rights enshrined in the Pact of San Jose and other pertinent human rights instruments across the Americas. Comprising seven judges who serve in their individual capacities, the Court operates under two primary jurisdictions: contentious and advisory. While both jurisdictions play a role in the Court's function, it is the contentious jurisdiction that holds greater relevance for a thorough examination of its judicial activities and decisions. According to Article 61 of the Pact of San Jose, only the Commission and those states that are parties to the Pact can submit cases for the Court's consideration. [177]

Currently, the cases that the Inter-American Commission submits are exclusively those that have advanced to court proceedings. This procedural distinction represents a notable divergence from the European system, where individual citizens have the right to directly file applications with the European Court of Human Rights. However, it is important to clarify that victims and their relatives are not entirely barred from participating in the actions of the IACHR; they have the ability to submit requests, present arguments, and provide supporting evidence throughout the process, facilitating their involvement in seeking justice. [178]

In many of its decisions, the IACHR explicitly acknowledges the substantial influence of European court jurisprudence on its interpretations. In the case of Ceasar, for example, the Court referenced the Celebici case from the International Criminal Tribunal for the former Yugoslavia, which articulated a definition of inhuman treatment as an intentional act or omission that, when subjected to objective evaluation, is deliberate and leads to severe

[176] Rodriguez Pinzón, D. Martin, C. *The Prohibition of Torture and Ill-treatment in the Inter-American Human Rights System: A Handbook for Victims and their Advocates*., OMCT Handvook Series, Vol. 2., 2006, p. 136.
[177] American Convention on Human Rights. Art. 61. (1): *„Only the States Parties and the Commission shall have the right to submit a case to the Court."*
[178] Buergenthal, T. Shelton, D. Stewart, D. P. *International Human Rights in a Nutshell*, St. Paul. Minnesota, West Publishing, 1988, p. 155.

physical or mental pain, thus constituting a significant assault on the intrinsic values of human dignity. Within this framework, both the Tribunal and the IACHR have made important distinctions between torture and inhuman treatment, underscoring the necessity for a detailed, case-by-case analysis of the severity of suffering and the context in which it occurs. Several factors come into play when making this distinction, including the duration of the treatment, the physical and mental consequences faced by the victim, and vital characteristics such as the victim's age, sex, and overall health. In the Ceasar case specifically, the individual was convicted of attempted rape and received a severe sentence comprising 20 years in prison, mandating hard labor, along with an additional punishment of 15 strokes with a cat o'nine tails whip. The IACHR ultimately ruled that such a punishment is unequivocally prohibited and constitutes torture, reflecting a serious violation of human rights. [179]

Moreover, the Court further articulated that the use of corporal punishment is inherently at odds with the provisions of Art. 5 of the Pact of San Jose, as it embodies characteristics that are cruel, inhumane, and degrading. This ruling reinforces the commitment of the IACHR to uphold the principles of human rights and to protect individuals from extreme forms of treatment that violate their dignity and humanity. The implications of such decisions signal the importance of a powerful legal framework that actively seeks to prevent torture and ensures that those who inflict such harm are held accountable, thereby fostering a culture of respect for human rights throughout the region. [180]

The reference to the Celebici case is not unique to the previous ruling; it also appears in other significant decisions within the American human rights system. Althought the decisions of the Commission are non-binding, they influence the region. In the González Pérez case, for instance, the Commission asserted that the sexual violence perpetrated by security forces against three indigenous women should be classified as a severe violation of Articles 5 and 11 of the Pact of San Jose. Mirroring the Tribunal's findings in the Celebici case, the Commission deemed that acts of rape and various forms of sexual assault qualify as torture. Additionally, it referenced the report from a UN Special Rapporteur, which provided compelling evidence that sexual violence results in both mental and physical devastation for the victims involved. Consequently, the Court recognized rape as a method used to punish, intimidate, and humiliate victims. [181]

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[179] IACtHR, Ceasar v Trinidad and Tobago, Case No.123, Judgment, 11 March 2005, para. 68.
[180] IACtHR, Ana, Beatriz and Celia González Pérez v Mexico, Case report No. 53/01, Annual Report, 4 April 2001, Para. 70.
[181] Ibid, Para. 45-54.

In another notable case, referred to as the Tibi case, the Court determined that the conditions of the victim's detention did not meet the necessary standards required to uphold the personal dignity of individuals deprived of their freedom. The detained individual had been placed in an overcrowded facility for 45 days, where there was insufficient space to eat or sleep comfortably, and the ventilation and lighting were inadequate.[182] The Court declared that even the mere threat of a genuine risk of torture can inflict mental harm and can be construed as torture in itself. [183]

The Moiwana Village case provides further context, involving the Moiwana community, which was established in the 19th century by the N'djuka people, the descendants of enslaved individuals who were brought to Suriname and forced to labor on plantations. While some enslaved people managed to escape and establish autonomous communities, this relative peace was disrupted by civilian rebellions, which triggered an internal armed conflict. During this turmoil, the Moiwana community became the target of military operations, leading to the tragic loss of civilian lives and the destruction of community buildings. Many members of this community were compelled to flee without the opportunity to conduct proper traditional burials for their deceased loved ones. When these individuals returned to their villages, the state refused to investigate the acts of brutality or punish those responsible. In its decision, the IACHR concluded that the state's failure to act constituted a violation that adversely affected the remaining members of the community. Furthermore, it ruled that the necessity for these individuals to flee in order to secure their safety amounted to a violation of Art. 5 of the Pact of San Jose, which guarantees the right to physical and mental integrity. This case highlights the broader implications of state accountability and its impact on the human rights of entire communities, emphasizing the need for thorough investigations and justice for victims of violence and torture. [184]

3.4. Concluding remarks on the Inter-American human right system

The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights serve as the two essential procedural institutions within the American human rights law system, tasked with addressing individual cases of human rights violations. While

[182] IACtHR, Tibi v Ecuador, Case report No. 114, Judgment, 7 September 2004, para. 152.
[183] Ibid, para. 147.
[184] IACtHR, Moiwana Village v Suriname, Case No. 124, Judgment, 15 June 2005, Para. 11-101.

the framework for human rights protection in the Americas differs from that of the European system, it is similarly established to uphold and safeguard common values of humanity.

At the core of the prohibition of torture, or the right to humane treatment within the Inter-American system, lies the principle of respect for the inherent dignity of the human person. This principle is also reflected in positive law, emphasizing the dignity of individuals. It is evident that states are obligated to ensure the protection and respect of these rights for prisoners under their control, particularly within institutions such as detention facilities.

The ACAT was established with the objective of promoting an effective and comprehensive prohibition of torture in countries of the region. A legislative framework was created, which was intended to be followed by appropriate measures for enforcement. However, despite the existence of monitoring mechanisms, there have been instances where no punitive actions have been implemented to prevent ongoing or future ill-treatment. States that continue to employ torture as a method for interrogation or punishment are in violation of the provisions outlined both in the ACAT and UNCAT, and their non-compliance undermines the very essence of the treaties. This issue is particularly concerning in democratic nations, such as the United States, which have documented cases of torture against individuals accused of crimes. Often, these governments attempt to rationalize their actions in the name of national security.

In addition to the enforcement shortcomings, the aforementioned conventions also possess textual gaps that contribute to ambiguities. One of the most notable issues is that neither the UNCAT nor the ACAT clearly delineates the differences between torture and other forms of cruel, inhuman, or degrading treatment and punishment. This lack of precision complicates the interpretation and implementation of these critical human rights protections. Despite these challenges, it is important to recognize that each of these conventions represents a significant milestone in the evolution of the prohibition of torture. Art. 5 of the Pact of San Jose has made a vital contribution to international human rights law, as it was innovative in its establishment of autonomous rights, paving the way for subsequent treaties, including the African Charter on Human and Peoples' Rights [185] or even the Charter of the European Union.[186]

[185] The African Charter on Human and Peoples Rights, opened for signature 27 June 1981, entered into force 21 October 1986, Art. 4.: "No one may be arbitrarily deprived of this rights." Art. 5.: "*Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of hus legal status."*
[186] Charter of Fundamental Rights of the European Union, 2010, Art. 3(1): *„Everyone has the right to respect for his or her physical and mental integrity.*

In conclusion, both the European Court of Human Rights and the Inter-American Court of Human Rights rests upon the common perspective: advancing standards for the protection of personal integrity necessitates more rigorous safeguards by states and a stronger commitment from international courts to address and rectify violations effectively. By reinforcing these principles, the international community can work towards a more powerful legal framework that protects individuals from torture and upholds their inherent dignity, which remains a fundamental tenet of human rights. [187]

[187] Antkowiak, T. and M. Gonza, A. *The American Convention on Human Rights: Essential Rights*, Oxford University Press, 2017, p. 22.

IV. Torture under the African legal and judicial framework

The African regional human rights system endeavors to merge universal human rights principles with the continent's unique cultural perspectives. This system embodies a synthesis of internationally recognized human rights norms with an appreciation for African traditions and communal values. Africa's pursuit of human rights is deeply interconnected with its extensive history of adversity, which includes centuries marked by exploitation, oppression, and fierce resistance. The impact of slavery, colonial domination, apartheid, and neo-colonialism has left a lasting mark on African societies. These historical experiences have fueled a collective resolve to construct a comprehensive framework for the protection of human rights. African nations strive to integrate the resilience and cultural richness of the continent with global human rights standards, aiming to create a system that respects both individual and communal well-being as part of their broader quest for justice and equality.

The Organisation of African Unity („OAU"), which was founded in 1963, did not expressly commit to the protection of human rights in its founding Charter. While the Charter did expect member states to adhere to the human rights principles set forth in the Universal Declaration of Human Rights in their international relations, it failed to establish binding obligations for enforcing human rights at the national level.[188] Although the absence of a specific mandate for human rights protection was notable, the OAU nonetheless engaged with several critical human rights issues that arose on the continent. These included the challenges associated with decolonization, which was a pressing concern at the time, as well as tackling racial discrimination that persisted in various forms across different nations. Environmental challenges were also recognized, reflecting a growing awareness of the impact of ecological degradation on human well-being. Additionally, the refugee crisis prompted the OAU to address the plight of displaced persons as conflicts erupted in various regions.[189]

However, despite these efforts to confront significant human rights challenges, the OAU was generally hesitant to address the widespread violations occurring within member states. This reluctance stemmed primarily from its overarching focus on socio-economic development and the imperative to protect the territorial integrity of its member countries. In addition, adherence to the principles of state sovereignty and the doctrine of non-interference in the domestic affairs of its member states further constrained the Organisation's ability to

[188] Organisation of African Unity (OAU) (1963) *Charter of the Organisation of African Unity* [Online]. Available at: https://www.refworld.org/legal/constinstr/oau/1963/en/20810 (accessed: 3.2.2025).
[189] See Abass, A. And Mystris, D. The African Union Legal Framework for Protecting Asylum Seekers. In Ippolito,F. and Abbas, A.: *Regional Approaches to the Protection of Asylum Seekers*, Routledge, 2016.

take a more assertive stance on human rights abuses.[190] As a result, while the OAU recognized certain human rights concerns, its approach was often limited by these foundational principles and priorities. The tension between promoting human rights and respecting state sovereignty continues to be a significant issue within regional organizations today.[191]

The adoption of the African Charter on Human and Peoples' Rights („ACHPR") and the creation of the African Commission on Human and Peoples' Rights („ACmHPR") in 1981 was a significant step towards the establishment of the African human rights system. The convention is the only significant document which recognizes a set of collective rights, including third generation human rights, such as the right to peace and security, right to satisfactory environment or the right to development. In addition the charter includes some obligations, which are rather unique, as individual duties towards family, society, legally recognized communities and state. Despite the innovative concept, which demands adherence from both state and individual, there is no practical mechanism estbalished to make individuals responsible for these violations.[192]

Significant shift in the creation of a more comprehensive and effective system was evident in the 1990's when numerous countries enjoyed democratization enhancing the focus on human rights. These processes resulted in the creation of some regional international treaties dealing with specific topics: African Charter on the Rights and Welfare of the Child, African Charter on Democracy, Protocol on the Rights of Women in Africa etc. The change was seen also in the establishment of the African Union by its Constitutive Act in 2002, which explicitly reffered to the respect of human rights and humanity. It noted, that the Union has the right to interfere when grave violations are committed in the members. The Act sets these grave violations as war crimes, genocide and crimes against humanity. Following the establishment of the fundamental principles of the Union it became evident that bodies acting on behalf of the protection are necessary for the implementation of principles. A protocol to the ACHPR was drafted in 1998 in order to establish a regional court. After the protocol gained sufficient number of ratifications, in 2004 the African Court on Human and Peoples'Rights („ACtHPR") could be established. Together with the Commission[193] this

[190] Murray, R. *Human Rights in Africa: From the OAU to the African Union*, Cambridge University Press, 2004, p. 7.
[191] See Naldi, G.J. *The organisation of African Unity: an analysis of its role*, London, Mansell, 1999.
[192] Evans, M. and Murray, R. *The African Charter on Human and Peoples' Rights: The System in Practice*, 2nd. Ed. Cambridge University Press, 1986-2006, 2008, p. 220-223.
[193] Here it is necessary to mention that the decisions of the African Commission on Human and Peoples' Rights are legally non-binding as the Commission can only make recommendations.

institution represents the bodies of the African human rights system dealing with the procedural application of human rights.[194]

The following chapter will be devoted to the critical analysis of the prohibition of torture in Art. 5 of the African Charter and related documents, as the guidelines resolution of the Commission from 2002, known under the name Robben Island Guidelines, which established the Committee for the Prevention of Torture in Africa. With the aim to make the picture complete, the chapter will analyze the most significant decisive works of the mentioned Committee, the African Commission as well as the jurisprudence of the African Court.

4.1. African Charter on Human and Peoples' Rights

„Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."[195]

Similarly to the universal or other regional human rights systems, the African system's prohibition stems in the human dignity and its protection. Althought, the fundamental value is comparably protected, we may observe significant differences. The most obvious is that the prohibition of torture is explicitly connected to the prohibition of slavery, which is understood as a different right in other human rights documents, as analyzed in previous chapters. The wording of the provision aims to cover any form of harm, which may be perpetrated on the individuals human dignity. The present is proven by the wording „all forms", which aims to cover even unforseeable actions. Consequently, making it necessary for the African Commission and Court to analyze every situation case-by-case taking into account the circumstances at hand. Furthermore, as already mentioned, as the ACHPR is uniquely posing obligations also to individuals, as the wording of the provision applies to any actions. Thus, regulating both the vertical state-individual relations together with horizontal individual-individual relations. The anticipation of the Charter hence goes beyond the traditional human

[194] Viljoen, F. *International Human Rights Law in Africa*, 2nd ed., Oxford University Press, 2012, p. 151-169.
[195] Article 5 of the African Charter on Human and Peoples' Rights, 1981.

rights protection seen in Europe or the Americas. In addition, the Charter prevails even the obligations stemming from the UNCAT, which has undoubtadely a state-centric approach.[196]

Althought from the textual point of view the provision setting the basis for the prohibition may seem as sufficient, the practical application is a sore-point of the regional system. The criticism towards the African Commission's approach regarding prevention of torture are well argumented. States are generally obliged to present periodic report regarding their obligations arising from Art. 5, however these are lacking details and more importantly the reports are mostly concerned with the implementation of the prohibition into their legislative framework. None of them in fact deal with the implementation of effective measures.[197]

The African Commissions' interpretation of the provision setting prohibition of torture is additionally worth mentioning. In its general comment to the right to redress for victims of torture, it elaborates on the key components of restitution, compensation, rehabilitation, satisfaction, and the right to truth, along with guarantees to prevent future occurrences. Addressing the issue of torture effectively requires an integrated approach that encompasses all three interconnected yet distinct domains: the outright prohibition of torture, proactive measures to prevent it, and the safeguarding of the rights and protections for victims. This comprehensive strategy underscores the necessity for cohesive action across multiple facets of the fight against torture.[198] The Commission has additionnally reffered to the UN human right framework, mainly to the Operational guide for national human rights institutions, where it is declared that the prohibition has fundamentally retrospective nature. The obligation is mainly a negative duty, where state authorities are banned from exercising any illicit treatment when dealing with individuals. The aforementioned is ensured by various procedural obligations generally stemming from criminal justice measures. However, this part of the prohibition entails also a remedial part, where states have the duty to investigate any actions which could have violated the prohibition. By providing justice to victims, the restorative justice approach aims to enhance the preventive perspective of the right. Nevertheless, the prohibition is entailing also positive aspects, where it expects from states to prevent the occurance of torture. In this context, the obligation is primarily oriented towards situations that happen

[196] Mute, L.M. Ensuring freedom from torture under the African Human Rights System. In Evans, M. D. and Modvig, J.: *Research Handbook on Torture*, Elgar, 2020, p.229.
[197] Mujuzi, J. *An analysis of the approach to the right to freedom from torture adopted by the African Commission on Human and Peoples' Rights*, African Human Rights Law Journal, Vol. 5, 2006, p. 434-435.
[198] General Comment on the Right to Redress for Victims of Torture or Ill-treatment under Article 5 of the African Charter on Human and Peoples' Rights, adopted at the 21st Extra-ordinary session of the African Commission on Human and Peoples' Rights, 23 February 2017.

before the act itself is committed. This duty is inherently proactive and anticipatory, necessitating that the state take affirmative steps or establish a comprehensive framework aimed at diminishing the likelihood of torture taking place. The strategy of preventing torture, along with the associated legal and moral duty, does not have to be limited to focusing on specific instances of egregious abuse or their formal classification. Rather, in the framework of torture prevention, the assessment of whether a particular action or treatment qualifies as torture or as another form of ill-treatment is not strictly necessary. Instead, the approach should concentrate on identifying and mitigating the conditions that foster an environment conducive to abuse and create vulnerabilities to ill-treatment in a broader context. This means that understanding and addressing systemic factors, such as inadequate oversight, lack of accountability, poor training of law enforcement agencies, and socio-economic conditions that perpetuate violence, becomes essential in the prevention of torture.[199]

Numerous additional treaties of the African human rights system complement the prohibition of ill-treatment incorporated in ACHPR with regard specific issues they deal with. The African Charter on the Rights and Welfare of the Child obliges the member states to implement comprehensive measures aimed at safeguarding children from all forms of illicit treatment. This obligation encompasses the creation of specialized monitoring units designed to oversee and ensure children's protection, as well as proactive measures to prevent, identify, and investigate instances of child abuse and neglect. By doing so, the Child Charter emphasizes a holistic approach to child welfare, ensuring mechanisms are in place to both anticipate and respond to potential threats to children's safety and well-being.[200] The African Youth Charter establishes a firm obligation for member states to ensure that youth who are detained, imprisoned, or placed in rehabilitation centers are afforded protection from any forms of illicit treatment. These commitments reflect a recognition of the unique vulnerabilities of children and young people and underscores the necessity for legal safeguards that prevent abuse within institutional settings. The Youth Charter's emphasis on humane treatment aligns with broader human rights standards and aims to foster an environment in which detained youth can reform and rehabilitate without facing further victimization.[201]

[199] OHCHR, Preventing Torture: An Operational Guide for National Human Rights Institutions, 1 May 2010. p. 9.
[200] African Charter on the Rights and Welfare of the Child, opened for signature 11 July 1990, OAU, No. Doc CAB/LEG/24.9/49, entered into force 29 November 1999.
[201] African Youth Charter, opened for signature 2 July 2006, AU, entered into force 8 August 2009.

Furthermore, it is necessary to mention several protocols additional to the ACHPR, which entail the prohibition with regard to the special protection of some vulnerable groups. The Protocol on the Rights of Women in Africa, commonly known under the name Maputo Protocol, incorporates gender-specific considerations into the continent's normative framework regarding illicit treatment. It explicitly asserts that every woman has the right to have her life, bodily integrity, and personal security respected, recognizing the unique threats women may face. The Protocol goes further to reaffirm the ban on all forms of exploitation and any cruel, inhuman, or degrading punishment or treatment, thereby elevating the discourse on women's rights and establishing a clear mandate for their protection.[202]

Furthermore, the Protocol on the Rights of Older Persons in Africa necessitates that state parties prohibit and penalize harmful traditional practices directed at older individuals. This protection is crucial for upholding not only the life and dignity of older persons but also specifically addressing the vulnerabilities of older women, who often face heightened risks of violence, sexual abuse, and gender-based discrimination. By enshrining these protections, the Protocol seeks to combat societal attitudes that may devalue the contributions of older generations and to promote their rights in accordance with principles of dignity and respect.[203]

Moreover, Protocol concerning the Rights of Persons with Disabilities further reinforces the commitment to uphold the dignity and inherent rights of individuals with disabilities. This Protocol explicitly guarantees their freedom from torture and ill-treatment, mandating that state parties ensure equal treatment in all circumstances. Importantly, it stipulates that persons with disabilities should not undergo medical or scientific experimentation or intervention without their free, prior, and informed consent, and that they must not be subjected to sterilization or other invasive procedures without genuine consent. Additionally, they are to be protected against all forms of exploitation, violence, and abuse, reflecting a profound commitment to ensuring the safety and empowerment of this marginalized group.[204]

In addition, the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, known as the Kampala Convention, mandates that state parties take proactive steps to protect the rights of internally displaced persons, irrespective of the reasons behind their displacement. This comprehensive protection requires

[202] Article 3-4 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, opened for signatures 1 July 2003, Doc. CAB/LEG/66.6, entered into force 25 November 2005.
[203] Article 8-9 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, opened for signatures 31 January 2016, entered into force 4 November 2024.
[204] Article 10 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, opened for signatures 2018, not in force (date: 3 April 2025).

states to refrain from and actively prevent acts such as arbitrary killings, summary executions, unjust detentions, abductions, enforced disappearances, as well as torture. The Convention acknowledges the plight of displaced persons and emphasizes that their dignity and rights must be safeguarded, particularly in situations that might lead to atrocities or further exploitation.[205]

These documents collectively enhance the legal and protective framework across Africa, ensuring that vulnerable groups such as children and women are afforded specific protections against abuse, exploitation and illicit treatment in general. They highlight the necessity for a multi-faceted approach to human rights that considers the distinct vulnerabilities and rights of different demographic groups, thereby fostering a more inclusive and protective societal structure. Together, these instruments illustrate a collective commitment to uphold human rights standards and to foster environments conducive to the protection and well-being of young people, older persons, persons with disabilities, and internally displaced individuals. This holistic approach is vital for addressing structural inequalities and ensuring that the rights of all individuals, especially those in vulnerable positions, are respected, upheld, and effectively protected.[206]

4.2. Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa

For decades a coherent strategy towards the prohibition including prevention of illicit treatment in the region was missing. As numerous experts were seeking for effective African mechanisms to combat torture, the African Commission on Human and Peoples'Right adopted in 2002 a resolution dealing with the implementation of the prohibition of torture. The three-day conference of experts managed to create the Guidelines for the prohibition of torture, also known under the name Robben Island Guidelines. The document has 50 provisions divided into three parts. The first parts provisions are devoted to the prohibition itself, the further parts provisions are connected to the prevention and the last is reponding to the needs of the victims. Nevertheless, as the name predicts, the guidelines are a non-binding document, hence unable to fully enforce its provisions. Still, the soft law was enough for the

[205] Article 9 of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, 2009.
[206] Mute, L.M. Ensuring freedom from torture under the African Human Rights System. In Evans, M. D. And Modvig, J.: *Research Handbook on Torture*, Elgar, 2020, p.230.

foundation for establishing a committee in order to develop policies which promote and facilitate the implementation of the documents provisions.[207]

The Guidelines consist of a comprehensive set of standards and principles that draw extensively from various international hard and soft law instruments. This collection is unique in that it includes provisions that are articulated with explicit detail and precision alongside others that are expressed in broader, more generalized terms. This variation in expression highlights the unlimited diversity characteristic of soft law, making the document a distinctive example of how such legal frameworks operate.[208] The guidelines can be seen as a mixture of provisions, each addressing different categories and objectives typically associated with the evolution of soft law, as identified by numerous scholars and commentators. Soft law, by its nature, can serve multiple functions, one of which is to clarify and elaborate upon obligations found in binding legal agreements. In this context, many of the provisions within these Guidelines offer detailed elaborations on the general prohibitions against torture and other forms of illicit treatment, echoing the commitments articulated in Art. 5 of the ACHPR. However, despite this elaborate framework, some provisions of the Guidelines still lack the specificity needed to fully achieve their intended purposes. They are broad strokes that lay a foundational ethos but require additional interpretation and elaboration to be effectively implemented. This need for further clarification illustrates the dynamic nature of soft law, which often evolves over time through additional policies, interpretations as well as legal commentaries. Thus, the Guidelines not only highlight the flexibility and adaptability of soft law but also highlight the necessity for continuous development and refinement of legal standards. They serve as both a tool for reinforcing existing legal commitments against torture and illicit treatment and a reminder of the ongoing need for precise legal articulations to support human rights protections effectively. Through their multifaceted approach, the Guidelines contribute to the broader discourse on human rights, offering a flexible yet powerful framework that can adapt to emerging challenges in international law.[209]

Nevertheless, although we may contemplate the effect of the soft law instruments for long and we may question that soft law has a normative content, there is no doubt that some of the „soft-law provisions“ are considered as customary law having binding nature. These are those provision, which are mostly already in other universal human rights instruments such as

[207] Murray, R. Long, D. *Ten years of the Robben Island Guidelines and prevention of torture in Africa: For what purpose*, African Human Rights Law Journal, Vol.12, 2012, p. 312.
[208] Baxter, R. *International law in her infinite variety*, International and Comparative Law Quarterly, Vol. 29, 1980, p. 554.
[209] Boyle, A. *Some reflections on the relationship between treaties and soft law*, International and Comparative Law Quarterly, Vol. 48, 1999, p. 901-903.

the ICCPR or the UNCAT. Concretely, the first part of the Guidelines, containing 19 provisions, include obligations like criminalization of torture, obligations to properly sanction the perpetrators, obligation of proper investigation or the principle of non-refoulment. Particularly, nine out of all of these provisions are enhanced in the article of the UNCAT, the rest call upon some coordination between states to combat illicit treatment in the region. Similarly, we may see in the second section, that in provisions 25 and 26, the right to obtain information regarding the reason of detention and possible sanctions were the results of the influence coming from Art. 9 of the ICCPR. The mentioned ICCPR articles wording can be further observed in provision 27 in the right to be heard in front of a judge including legal representation, as well as in provision 32 stipulating the right to challenge the lawfulness of the detention. Moreover Art. 10 of the ICCPR has a reflection in provision 35 related to the segregation of convicted from unconvicted. In addition, the ICCPR in Art. 10 para. 2 declares the separation of different groups included their separate treatment, similarly the Guidelines in provision 36 explicitly mentions the different treatment of different vulnerable groups, such as juveniles and women.[210] Furthermore, both Art. 15 of the UNCAT and the provision 29 of the Guidelines establish, that evidence obtained through illicit treatment is inadmissible.[211] However, as one may observe these article in the Guideline concerned with torture are connected to those articles of international treaties which are devoted to the freedom to liberty. Thus, the Guidelines put an emphasis on the prohibition from the perspective of detention.

Nonetheless, several articles of the Guidelines in some parts go beyond the UNCAT or the ICCPR. Some provisions of the Guidelines specify the rights concerning the special circumstances of a person being in a vulnerable position. Art. 20 sets the procedural safeguards for those who are deprived of their liberty, setting the right to notify an appropriate person about the detention, the right to get medical examination or the right to get legal help. All of the above in a language understood by the detained person.[212] However, these provisions are more likely influenced by the soft law of the field. Several rights, included in the second section, provide a clear reference to established international soft law instruments that articulate minimum standards and safeguards regarding the treatment of individuals who are deprived of their liberty. These instruments, like the Nelson Mandela Rules, serve as

[210] Provision 25 and 26 of the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, 2002; Article 9 of the International Covenant on Civil and Political Rights, 1996.
[211] Ibid, Provision 29; Article 15 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.
[212] Ibid, Provision 20.

essential guidelines and benchmarks for humane treatment, urging states to adhere to internationally recognized principles. The origins of several provisions can be traced back to various forms of soft law, which play a crucial role in shaping international human rights standards. These forms of soft law include General Comments of the UN Human Rights Committee.[213]

As an example we may analyze, for instance, provision 24 of the Guidelines, which explicitly prohibits the practice of incommunicado detention, which refers to the detention of individuals without any communication with the outside world, including family or legal counsel. While international standards do not generally ban incommunicado detention in all circumstances, the mentioned UNHR Committee has emphasized the risks associated with this practice, stating in its General Comment 20 that the prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman, or degrading treatment. This statement underscores the inherent dangers of isolating detainees from external oversight and support, which can increase their vulnerability to abuse.[214] Furthermore, also the report of the Special Rapporteur on Torture has consistently called for the prohibition of incommunicado detention, illustrating a widespread consensus among human rights experts regarding the necessity of protecting individuals from potential harm. The collective advocacy against this form of detention highlights the ongoing concern about the treatment of individuals who are deprived of their liberty and the need for safeguarding their rights.[215] By grounding the prohibition of incommunicado detention in these guidelines the aim is not only to prevent torture and ill-treatment but also emphasize the importance of transparency, accountability, and upholding the rule of law in the treatment of all individuals in custody. The call for compliance emphasizes the importance of ensuring that all measures implemented by states are not only in harmony with these soft law instruments but also formed by their core values and standards.

The third part of the Guidelines is devoted to the issue of victims and their needs. The Guidelines here, in two provisions, ensure the protection of anyone who may be a victim of torture pursuant to the report or investigation. The first, provision 49, reflects to the right to complain in Art. 13 of the UNCAT by setting the basis for the protection for anyone who may

[213] The insights and interpretations provided by these bodies serve to clarify and elaborate on existing human rights obligations. Moreover, the opinions expressed by the UN Special Rapporteur on Torture further enhance the understanding of these provisions and their application in practice.
[214] Human Rights Commitee, General Comment 20, UN Doc. HRI/GEN/1/Rev.6, 2003, para 11.
[215] Report of the Special Rapporteur on Torture, UN Doc. E/CN.4/1995/434, 1996, para 926(d).

be part of the investigation of abuse of powers by authorities.[216] The provision 50 declares the duty to reparation irrespective of the successful criminal prosecution which has been brought. However, this provision is most likely problematic, as it includes an extremely wide understanding of the victim status. The second sentence of the provision explicitly states: *„ Thus all States should ensure that all victims of torture and their dependents are: a) offered appropriate medical care; b) Have access to appropriate social and medical rehabilitation; c) Provided with appropriate leves od compensation and support.“*[217] Hence, the interpretation of this privision clearly poses an obligation of States towards victims and their relatives, not just the victims of illicit treatment themselves. The provision‘s last sentence adds to this understanding, that families and communities, where one of its members was victim of ill-treatment can be considered as victims as well. Consequently, the Guidelines in this sense understand under the notion of victim of ill-treatment a very broad scope of people, including those which suffered mentally on the basis that their close relative or even member of community was a direct subject of illicit treatment. The provision sets, that even these dependents are entitled to be offered medical care, social and medical rehabilitation and compensation. If we take into account the definition of torture included in Art. 1 of the UNCAT, which is part of the human rights protection regime of Africa, we may come across an exceptionally extensive understanding who is a victim,[218] i.e. a person’s third neighbour in the village is entitled to compensation on the basis of a common community. If we add, that the direct victim experienced a severe psychological trauma from actions of authorities, the compensation of its neighbour becomes ridiculous. Some argue that the provision in Guidelines is aimed to reflect Art. 14 of the UNCAT. Nonetheless, the compensation of dependents included there, is applied to the event of the death of a victim as result of torture.[219] However, the Guidelines mentions no such circumstance enabling compensation solely on the basis of the relationship with the direct victims. Althought the provision may be undoubtadely problematic, it reflects the discussion during the drafting process of the Guidelines, where the drafters aimed to incorporate some provision concerning the protection of communities presenting that such acts of violence have a strong influence on whole

[216] Article 13 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; Provision 49 of the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, 2002.
[217] Provision 50 of the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, 2002.
[218] Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.
[219] Ibid, Art. 14.

communities and it can be challenging for the direct victim to reintegrate into the society after experincing injustice.[220]

Nonetheless, the Robben guidelines generally omits specific issues regularly included when prohibition of torture comes into the fora. The Guidelines are strongly concerned with treatment in detention, however it does not deal with the possibility of illicit treatment in other facilities, where person may be similarly in vulnerable position, like in situations of asylum matters. Furthermore, there is absolute omission of the issue of the abolition of death penalty, considered in various treaties as part of the prohibition of torture right.

As we see from the above included short analysis of the Guidelines, it becomes clear that a significant number of the provisions outlined in the document can be directly traced back to obligations set forth in various international treaties, as well as standards delineated in existing international soft law instruments. These connections extend to General Comments and decisions rendered by UN treaty bodies, along with insights from the Special Rapporteur on Torture. Consequently, when examining the provisions of the Robben Island Guidelines, it is important to note that, apart from their titles, these elements are not easily associated with the region itself. This is particularly evident in the fact that the provisions do not draw upon African instruments or the jurisprudence that has developed within the region. Instead, their foundation is primarily rooted in documents produced by the United Nations, and in certain cases, they utilize instruments that originate from other geographic regions. One provisison was obviously influenced by a document existing in the EU human rights platform. The provision 14 of the Guidelines, requires states to prohibit and prevent the use, production and trade equipment or substances used for inflicting torture. The earlier version of the Guidelines on EU policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment from 2001, included a similar wording in its part devoted to action against torture to urge third countries to take some measures.[221] This reliance on global frameworks highlights a broader trend where regional identities may not be as prominently reflected in the legal texts that govern obligations and standards within specific contexts.

The reliance on conventions and guidelines of the universal human rights protection presents that the African human rights framework, as to the textual perspective, generally lacks specificity of the region. Besides the unusual „community victims“ status in the penultimate provision and the title „African“ any special approach is missing from the

[220] Lapsley, M. Measures required on rehabilitation and reparation. The case of South Africa. In Association for the Prevention of Torture: *Preventing Torture in Africa*, Geneva, 2003, p. 136-139.
[221] Guidelines to EU policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment, Council of the European Union, N. 7369/01, 2001, p. 6, para B.

Robben Guidelines. However, it neccessarily does not lead to a reason for criticism. On the contrary. The prohibition of torture, being *ius cogens*, when understood similarly in various regions may lead to more proper and effective implementation of international standards in the matter. As the right is universal, including cultural diversity in the wording of a right of this high value, may have a negative impact. Not to mention that arguing for controversial issues may have resulted in weaker standards than those which are already included in the universal protection. Nevertheless, as mentioned above, some provisions which are overally missing are definitely reasons for criticism, such as the omission to include the abolition of death penalty. Anyhow, the Guidelines have positive and negative aspects as well, yet intended to modify the state behaviour the documents is missing the most important part, the binding force.[222]

4.3. General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment

The African Committee decided in 2015 that it would like to strengthen the position of the victims of illicit treatment and thus it drafted its general comment no.4. concerning the right to redress. The right to redress fundamentally encompasses both the entitlement to an effective remedy and the assurance of adequate, comprehensive, and effective reparation for those who have suffered injustice. This principle highlights that the ultimate objective of redress is not merely to compensate victims but to instigate a profound transformation within the society at large. In this context, redress should not simply be a remedial action, but rather, it must serve as a catalyst for meaningful changes in the social, economic, and political frameworks that govern communities. Such changes are essential to address the root causes and underlying conditions that permit the existence of any form of illicit treatment. The transformation that redress seeks to achieve involves the implementation of processes that have a long-term vision, ensuring that they are sustainable and adequately address the diverse and multifaceted justice needs of victims. Moreover, this transformative approach plays a critical role in recognizing and restoring the dignity of individuals who have endured these violations. To effectively realize the right to redress, it is imperative to adopt a wide-ranging interpretation of the obligations that states hold. This includes the necessity for these states to

[222] See Long, D. Murray, R. *Ten years of the Robben Island Guidelines and prevention of Torture in Africa: For what purpose?*, African Human Rights Law Journal, Vol. 12/ 2, 2012.

develop and implement comprehensive legal, administrative, and institutional frameworks aimed at fulfilling the right to redress. By doing so, states not only acknowledge their responsibility but also create avenues for victims to seek justice and obtain the reparations they deserve, reinforcing a commitment to upholding human rights and promoting a more just society.[223]

The Comment declares, that it is critically important for the national authorities to establish comprehensive redress procedures in different fields, including mechanisms that are easily accessible to all victims of human rights violations. In particular, special measures must be implemented to ensure that victims held in places of detention, as well as those who are marginalized, discriminated against, or otherwise disadvantaged, can access the support and reparations they need. These individuals often encounter formidable obstacles that hinder their ability to obtain full and effective redress, and they may be vulnerable to further victimization as well as stigmatization. In order to be able to effectively address these challenges, a variety of targeted measures should be adopted. For example, establishing specialized clinics with trained staff focused on providing trauma counseling can be instrumental in aiding victims' recovery. The document requires the creation of legal advice centers and mobile law clinics, which can additionally facilitate access to necessary legal support. Furthermore, it includes claims that developing outreach programs is essential to ensure that all victims, regardless of their circumstances, are informed about and able to access the available pathways for redress. Support for civil society initiatives and organizations of various communities, that work directly with victims can be another vital strategy. These organizations often possess the local knowledge and expertise needed to effectively assist individuals in navigating the redress system. Moreover, authorities should prioritize reasonable accommodation measures on a individual basis for persons with disabilities and others who may need tailored support to fully engage with redress mechanisms. It adds that it is equally important to ensure that special redress measures are in place, specifically designed when unique needs arise such as circumstances of children who are victims of torture of any illicit treatment. By taking these comprehensive steps, national authorities can better fulfill their obligations to protect and promote the rights of all victims, facilitating healing and fostering a more just society.[224]

[223] General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), 2017, para 8.
[224] Ibid, para. 22.

The documents refers to different issues connected to the treatment of victims, including their proper compensation. However, here the reader does not find any link to the unusual compensation scheme of dependents of the victims as it was observed in the Robben Island Guidelines. Nonetheless, the satisfaction provision including the right to truth is worth mentioning. The comment in this part presents the understandable demand of the victim for the acknowledgment of the State's responsibility, enhancing effective documentation of complaints, and comprehensive investigation and prosecution of violations. The need to verify facts and ensure public disclosure of the truth may have a strong impact on the mental health of the victim including preventional elements. While the topic of the influence of human right litigation on the justice system of countries is not the topic of the pertinent dissertation it is worth mentioning that the right to truth, in connenction to the prohibition of torture, is an important driving element of the societal development.[225] Additionally, satisfaction involves also efforts to locate disappeared individuals, abducted children, and the remains of those who have been killed, along with providing assistance in the recovery, identification, and respectful reburial of victims' bodies according to the wishes of the victims or their families. It encompasses official declarations or judicial rulings that seek to restore the dignity, reputation, and rights of victims and those closely associated with them.[226]

The General Comment provides guidance on the topic of victims of illicit treatment, it enhances numerous obligations besides the analyzed questions: redress when collective harm, punishment of sexual and gender based violence, obligations during armed conflict or protection against intimidation, retaliation and reprisals. Nonetheless, the situation is again the same is with the Robben Island Guidelines. None of these provisions has a binding force and thus they are purely suggestions for the African region.

4.4. Committee for the Prevention of Torture in Africa

In 2004 the African Commission has managed to agree upon the establishment of the Follow-up Committee on the implementation of the Robben Island Guidelines. Its aim was to support the partners when implmenting the Guidelines, to develop and propose policies to the Commission in the matter and to promote the implementation of the document. The

[225] See Duffy, H. *Strategic Human Rights Litigation. Understanding and Maximising Impact*, Hart Publishing, 2018.
[226] General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), 2017, para 44.

Committee was later, on the basis of a African Commission resolution in 2009, renamed to the Committee for the Prevention of Torture in Africa.[227]

The expectation was that the establishment of a specialized mechanism which would promote and monitor the implementation of the Guidelines would serve as a crucial focal point within the African Commission, enabling the development and execution of a comprehensive strategy. However, preliminary findings from the research of Murray and Long reveal, that there has been a disappointingly low level of engagement with the Guidelines. This lack of utilization is evident not only among African states but also within the African Commission itself and the broader African Union.[228]

For the proper functioning of the Committee for prevention of Torture, the African Commission has created, by resolution in 2022 ,Rules on the Establishment and Operation of the Alert and Reporting Mechanism to the African Commission on Human and Peoples' Rights on Situations of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, also known as the Abidjan Rules. The Abidjan Rules establish the Committee's primary function as an alert and reporting mechanism for the African Commission focusing on situations of illicit treatment. While the rules don't explicitly outline direct actions towards the African Court on Human and Peoples' Rights, the Committee significantly influences potential Court involvement. The Commitee has the duty to diligently gather and analyze information on alleged torture cases through various channels, followed by the creation of reports regarding these findings to the African Commission. This crucial information allows the Commission to conduct investigations, issue urgent appeals or statements, and potentially apply pressure on states. Although the Committee doesn't directly refer cases, it provides foundation upon which the Commission might decide to refer a case to the African Court. Furthermore, the Commitee fosters cooperation with partner organizations, thereby strengthening the potential evidence base for any subsequent cases brought before the African Court.[229]

Generally, it can be argued that the establishment of the Committee is instrumental in keeping the issue of torture consistently highlighted on the agenda of the African Commission during each of its sessions. The presence of a designated figurehead for torture likely ensures that pertinent questions are raised during the state reporting process, with the expectation that

[227] Resolution n. 158, 46th ordinary session of the African Commission on Human and Peoples'Rights.
[228] Long, D. Murray, R. *Ten years of the Robben Island Guidelines and prevention of Torture in Africa: For what purpose?,* African Human Rights Law Journal, Vol. 12/ 2, 2012, p. 339.
[229] Rules on the establishment and operation of the alert and reporting mechanism to the African Commission on Human and Peoples'Rights on situations of torture and other cruel, inhuman or degrading treatment or punishment. „Abidjan Rules", 2022.

the Special Rapporteur and the commissioners assigned to the Committee will take the lead in addressing inquiries related to their specific mandates. However, it is also likely that discussions concerning torture would still occur organically, even without the existence of the Committee. There is limited evidence to suggest that the nature of the questions raised during these state reporting sessions is significantly more nuanced or detailed than they would have been, if there had been no Committee or established Guidelines in place. This raises important questions about the actual impact and effectiveness of the Committee in enhancing the depth and quality of the discussions surrounding torture, suggesting that the conversations around this critical issue may have remained relatively consistent, regardless of the Committee's influence, not to mention that its reports and recommendations does not have binding nature.[230]

4.5. Case-law of the system

The African Commission has adjudicated a significant number of cases brought before it through its established complaints procedure, each alleging a breach of Art. 5 of the ACHPR. These cases demonstrate a considerable diversity in their factual circumstances and the specific contexts in which the alleged violations occurred. This breadth of experience and the range of situations considered by the Commission significantly contrasts with the types of cases that have typically come before the ACtHPR. The Commission's mandate and procedures appear to have resulted in a greater diversity of cases brought before it, encompassing a wider spectrum of situations compared to the more limited number of cases, and potentially a narrower range of circumstances, that have been presented to the Court for adjudication. This difference in the scope and variety of cases handled by these two bodies reflects differences in their respective mandates, procedures, and perhaps also the threshold for bringing cases before each institution.

The case of Huri-Laws against Nigeria from 1998, involved allegations of severe human rights abuses against the Civil Liberties Organisation by the Nigerian government. Huri-Laws, representing the mentioned organisation, detailed systematic harassment, including arbitrary detention of staff in inhumane conditions, denial of medical care and access to legal counsel and family including instances of illicit treatment. Central to the case was the alleged violation of Art. 5 of the ACHPR. Huri-Laws argued that the cumulative

[230] Ibid, p. 340.

effects of arbitrary detention, isolation, and unsanitary conditions constituted cruel, inhuman, and degrading treatment. The Commission, while acknowledging the absolute nature of the prohibition, adopted a contextual approach explicitly reffering to the European human rights framework and the decision of ECtHR on the Ireland v. United Kingdom precedent. Hereby the Commission took into consideration factors like duration, impact, and the victims circumstances. The Commission ultimately found Nigeria in violation of the article, emphasizing that the denial of medical care in detrimental conditions and the restriction of contact with the outside world were unacceptable, failing to respect the inherent dignity of the individuals concerned and directly contradicting key principles of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The decision underscores that the cumulative effect of various forms of illicit treatment, even if individually below a specific severity threshold, can constitute a violation stipulated in Art. 5.[231]

The question whether the death sentence constitutes illicit treatment was brought to attention just in the year 2006 through the case of Egypt Initiative for Personal Rights and Interights against Egypt. The applicants besides detailing the use of torture to secure confessions, prolonged incommunicado detention denying access to legal counsel and medical care, argued that the death sentence itself, violated Art. 5 of the ACHPR. The Commission, referencing the UNCAT, rejected the Egyptian government's claims that the injuries were unverified or not state-inflicted. It emphasized the presumption of state responsibility for injuries sustained in custody, placing the burden on Egypt to refute the allegations. Despite evidentiary limitations due to the incommunicado detention, the consistent victim testimonies supported the torture claims. Finding Egypt in violation of article, the Commission highlighted not only the evidence of torture but also the denial of essential rights, including prompt medical attention, legal representation, and timely access to a judicial authority. Although the death penalty was addressed separately under a different Charter article, the Commission's decision firmly established that the cumulative impact of torture, incommunicado detention, and denial of due process constituted a violation of the prohibition against cruel, inhuman, or degrading treatment.[232]

The jurisprudence of the African Court has dealt with the issues of illicit treatment likewise. The majority of cases dealt with the conditions in detention facilities and the

[231] African Commission, Huri-Laws v. Nigeria, Communication No. 225/98, Decision, 6 November 2000.
[232] African Commission, Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt, Communication No. 334/06, Decision, 1 March 2011.

treatment of detained person. In the case Nguza against Tanzania from 2018 the detained were facing serious charges, such as rape and unnatural sexual offences. This lead to their conviction and sentence. After their sentencing, they raised significant concerns regarding potential violations of their rights stemming from Art. 5. They detailed several issues related to their treatment during detention, alleging that they were subjected to mistreatment by police officers, including instances of insults as well as molestation. Additionally, they claimed they were held incommunicado for four days, meaning they were isolated without any communication with the outside world or even a legal counsel. This lack of contact heightened concerns about their treatment and rights in accordance with international human rights standards. Moreover, the applicants brought to light the poor sanitary conditions in their cell, which they described as intolerable. The conditions experienced during detention are essential in evaluating the treatment of detainees and their human rights. In its assessment, the ACtHPR referred to earlier rulings, notably a case from 2017 involving Onyachi and Njoka against Tanzania.[233] This established case illustrated that incommunicado detention frequently occurs in obscured circumstances, complicating the ability for victims of human rights violations to substantiate their claims. The Court acknowledged that the state often holds the evidentiary control necessary to validate the detainees' allegations, making it a challenge to prove such violations.[234]

The matter of burden of proof in human rights issues can be quite intricate, and hence the Court cited relevant legal principles laid out in the Diallo case before the ICJ to clarify its viewpoint.[235] It concluded that the burden of proving claims should not solely rest with one party, but should instead rely on the specific facts required for the case's resolution. Therefore, the Court took on the responsibility of analyzing all pertinent circumstances to establish the relevant facts surrounding the the allegations. In the end, the Court determined that the applicants did not present adequate *prima facie* evidence to substantiate their claims of mistreatment and incommunicado detention in order to held the state liable. Given the lack of credible evidence indicating a violation of their rights under Art. 5, the Court dismissed their claims associated with this article.[236] This ruling emphasizes the challenges that

[233] ACHPR, Kennedy Owino Onyachi and Another v United Republic of Tanzania, Application No. 003/2015, Judgment, 28 September 2017, para 159.
[234] ACHPR, Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania, Application No. 006/2015, Judgment, 23 March 2018.
[235] ICJ, Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo), Case No.1001, Judgment, 30 November 2010, para 56.
[236] ACHPR, Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania, Application No. 006/2015, Judgment, 23 March 2018, para 73.

individuals encounter when asserting human rights violations, especially in situations where they are unable to provide solid evidence to support their arguments.

Further case of the ACtHPR also from Tanzania represents the distinc approach of the region in important topics, such as the death penalty. The judgment from 2019 in the Ally Rajabu case concerned applicants who were sentenced to death. The applicants besides claiming various violations, presented that the method of death penalty, hanging of the convicted, represents a violation of Art. 5. The Court in the judgment stipulates that there are numerous methods of the execution of the death penalty, which have the potential to amount to torture or other form of ill-treatment. The Court adds, that where death penalty is permissible, the methods have to use the least suffering possible. As regards hanging, the Court declares, that it is method which is degrading and thus it violates Art. 5. [237] However, the judgment does not elaborate on the reasons why does the Court understands hanging as a degrading treatment and whether there is an attempt to diminish this practice in the future in the countries of the African Union.

Lastly, just to briefly add, the Economic Community of West African States Court of Justice (also known as Abujan Court) has some mentionable jurisprudence related to the prohibition of torture in the region as well. The newer 2020 case from Nigeria revolved around claims concerned with disciplinary process which resulted in a formal warning. As the warning was made public, the applicant argued it caused him significant mental distress and harmed his reputation and integrity, thus violating his rights as set out under Art. 5 of the African Charter. The Court of Justice in the present case acknowledged that psychological forms of torture can have lasting effects, even when they do not inflict physical pain or leave visible marks. These forms may encompass various types of mental abuse, such as mock executions, sleep deprivation, and humiliation. In this situation, the applicant contended that after receiving the warning and being placed on a judicial watch list, he experienced substantial emotional suffering, which he described as mental torture and a distortion of justice. However, after carefully examining the evidence presented by the applicant, the Court found that it did not adequately support the torture claims. The Court noted that there was no indication that the pain and distress were intentionally caused by the state or that the actions taken served purposes like punishment or intimidation. Furthermore, there was no proof that the warning's publication was executed with the involvement or consent of state authorities. Even though as a result, the Court concluded that the allegations of torture were not

[237] ACHPR, Ally Rajabu and Others v United Republic of Tanzania, Application No. 007/2015, Judgment, 28 November 2019, Para 118-120.

sufficiently substantiated, the Abujan Court made a step towards similar intepretations, as we have observed in the European framework.[238]

4.6. Concluding remarks on African human rights system

Non-compliance with human rights treaties is particularly widespread in developing nations such as those in Africa. Perhaps even more alarming for the human rights movement is the fact that this disregard for treaty obligations often occurs without any repercussions. Currently, there are no sanctions imposed on a state that fails to meet its treaty obligations, including basic requirements like the timely submission of state reports. This underscores the urgent need for reforms that focus on ensuring full compliance with treaty obligations, especially those related to human rights. It is vital to implement sanctions for any state party that does not comply with each and every provision of the treaties to which it has committed itself. The consequences of non-compliance must be more severe than the perceived advantages of ignoring these obligations, otherwise, we risk allowing many international treaties to be filled with provisions that hold no real weight. The current trend revolves around the proliferation of numerous treaties, declarations, and principles concerning human rights, while implementation and adherence to these commitments receive minimal attention. This lack of focus on actual compliance undermines the effectiveness of these legal frameworks and hinders meaningful progress toward the safeguarding of human rights. In addition, prohibition of torture within international instruments have reached the level of *ius cogens*, indicating that their applicability extends beyond the bounds of a State's accession or ratification of those instruments. This status signifies that these fundamental rights are universally binding and not contingent upon formal acceptance by individual states. The widely accepted view is that a nation cannot invoke the principle of sovereignty as a means to justify the abuse of its citizens' human rights. This understanding is informed by the responsibilities that States owe under the UN Charter, along with the fundamental nature of human rights included also in the African human rights system.[239]

The reported instances of torture and ill-treatment, including deaths in custody, continue to be alarmingly high in Africa. Individuals from various backgrounds, even children

[238] See Economic Community of West African States Court of Justice, Hon. Justice Aladetoyinbo V. Federal Republic of Nigeria, Judgment, No. ECW/CCK/JUD/18/20, 14 July 2020.
[239] Oluoch, W. *States'Compliance with their Obligations under International Human Rights Instruments with Specific Reference to Prohibition of Torture: The Case of Kenya*, East African Journal of Human Rights and Democracy, Vol. 3, 2005, p. 10.

and women, political activists and those arrested in connection with criminal investigations, as well as people held without formal charges, have made allegations of such abuses. Certain groups, including refugees and individuals detained based on their sexual orientation, face heightened vulnerability. For non-political detainees, the majority of torture incidents are primarily reported to occur in police stations, on the other hand, political prisoners may suffer continous abuse in prison facilities.

The legal framework to stop the widespread violations of the prohibition do exist in Africa. Besides some defects observed in the Robben Island Guidelines and the General Comment No. 4 we may conclude, that these documents strongly influenced by other human rights framework, such as the universal or European, could help preventing ill-treatment in the region. Nonetheless, none of these documents has a binding nature. The African Charter is the only one which enhances the prohibition in its Art. 5, including also prohibition of slavery, having binding character. As the Charter does not include the definition, the region has possibilites to interpret the notion according to its specialized needs. One can yet deduce, this does not come as a positive approach, enabling the countries to abuse and limit the scope of Art. 5. The process which may help is the work of the African Commission or the African Court. The decisions of the Commission are not binding and the jurisprudence of the Court applies just to those countries which ratified the protocol establishing the Court. Thus, the states of the African Union have no obligation to enable its individuals to reach for help. Consequently, if countries do not want to abide by the human rights rules they do not have to. Regarding the jurisprudence of both the mentioned institutions we have observed gaps likewise. A notable trend in the jurisprudence of the African region is that most claims under the Art. 5 ACHPR prohibiting torture, pertain to detention in jails or prisons, along with the treatment received in those settings. We may see the attempts of these institutions to apply the same interpretation as in the universal human rights platforms, concretely the UNCAT, incorporating mental suffering in the definition of torture, i.e. Economic Community of West African States Court of Justice contemplated mental suffering as sufficient to fall within the scope of ill-treatment. Nevertheless, even in the case-law there are still evident gaps, as allowing capital punishment by omitting to ban it through establishing, that it falls under the acts of ill-treatment.

Finally, lot has been said and written on the gaps and issues related to the African human rights system. Nonetheless, keeping in mind that the region was for decades victim of abuses resting upon decolonization, followed by the spread of armed conflicts infused by the famine in countless states, the system and the level of human rights is developing quate

nicely. Additionally, in comparisom to Asian human rights it is significantly more developed and even successfully spreading also to national laws of some states. In the pertinent we may mention South Africa's Constitution,[240] which mandates the exclusion of evidence obtained in violation of its Bill of Rights if its admission would prejudice the fairness of the trial or the administration of justice. Furthermore, the country's Supreme Court of Appeal has ruled that evidence obtained through torture, whether inflicted on the accused or a third party is inadmissible.[241] The following example is thus a great one to present the development in the understanding of the torture prohibition in the African region.

[240] Section 35(5) of South Africa's Constitution.
[241] Roach, K. *Comparative Counter-Terrorism Law*, Cambridge University Press, 2015, p. 559.

V. Torture under other legal and judicial framework

Despite the increasing attention given to human rights globally, the Asian context remains relatively underexplored, primarily due to the multitude of challenges that the region encounters. Several factors contribute to the imperfections observed within the human rights framework across Asia. One significant aspect is the lack of cohesiveness within the region, characterized by a rich tapestry of diverse cultures, religions, and political regimes, each demonstrating varying degrees of commitment to establishing and maintaining a functional human rights system. Asian governments have a well-documented history of adopting a reserved stance toward international human rights standards, often invoking the notion of cultural exceptionalism. This perspective is frequently articulated through the concept of „Asian Values“, which posits that the region's unique historical and cultural context necessitates a distinct approach to human rights that may diverge from Western models.[242]

Currently, this approach is experiencing a resurgence, as elements of these values, reemerge in both national policies and subregional strategies concerning human rights. This renaissance reflects an ongoing dialogue about the balance between universal human rights principles and culturally specific practices. As various states in Asia seek to define their positions on human rights within this complex intersection of global standards and local traditions, it becomes increasingly evident that understanding the Asian context necessitates an appreciation for its inherent diversity. This diversity not only shapes the discourse on human rights but also influences the effectiveness and implementation of human rights protections throughout the region. Ultimately, while the challenges confronting the Asian human rights framework are considerable, they also present opportunities for dialogue and engagement that can enrich the global conversation on human rights. By recognizing and addressing these complexities, countries can work toward creating a more inclusive and responsive human rights framework that honors the region's cultural distinctiveness while upholding fundamental human rights principles.

The worldwide promotion and protection of human rights have evolved into a comprehensive tripartite framework comprising national, regional, and international regimes. This intricate architecture has developed over time, reflecting a growing global consensus on the importance of human rights as foundational to human dignity and justice. In recent years,

[242] Steiner, K. The Challenges for Human Rights is Asia: Islam and the Patchwork System for Freedom of Religion in Malaysia. In Kannowski, B.: *Regional human rights: international and regional human rights: friends or foe?* Baden-Baden, Nomos, 2021, p.97.

noteworthy expansions to this framework have emerged, particularly with the attempts of establishing regional systems also in the Middle East and the Far East. These systems may introduce additional layers of governance and accountability, contributing to the broader discourse on human rights while addressing the unique cultural, political, and social contexts of these regions. The emerging presence of these regional systems within the human rights landscape signifies a positive step toward a more inclusive and comprehensive understanding of human rights protection, enabling diverse regions to contribute their perspectives and experiences to the global conversation on human dignity and justice. This dynamic interaction among various levels of governance serves to strengthen the overall human rights regime while emphasizing the interconnectedness of rights on a global scale.[243]

5.1. Islamic perspective

The Islamic human rights system is structured under the frameworks of three prominent intergovernmental organizations: the Gulf Cooperation Council („GCC"), the Organization of Islamic Cooperation („OIC") and the Arab League. The GCC has only 6 member states, the Arab League comprises 22 member states, the OIC expands this membership to 57 countries, highlighting a significant yet partially overlapping representation of states dedicated to promoting and protecting human rights within an Islamic context.

The GCC has made strides in addressing human rights issues. In 2014, the Council adopted the Gulf Declaration of Human Rights, marking a significant but singular step toward establishing a cohesive human rights agenda in the Gulf region. This declaration aims to outline the principles and rights that should be respected and upheld by member states in accordance with Islamic values and norms. Article 36 of the Declaration prohibits torture, as well cruel, inhuman and degrading treatment.[244] Thus the declaration is keeping the mantra of notions seen in the package of ill-treatment already in other regional human rights frameworks. Nevertheless, the declaration offers no real posibility for application as it is being legally non-binding.[245]

The OIC was established already in 1969 with the purpose to strengthen the solidarity between the Muslim nations. The first step towards inclusion of human rights was the

[243] Almutawa, A. The Arab Court of Human Rights and the Enforcement of the Arab Charter on Human Rights, Human Rights Law Review, Vol.21, 2021, p. 506.
[244] Article 36 of Human Rights Declaration for the Member States of the Cooperation Council for the Arab States of the Gulf, adopted by the High Council in its 35th session, opened for signature 9 December 2014.
[245] See El-Mumin, M. *The GCC Human Rights Declaration: An Instrument of Rhetoric?* Arab Law Quarterly, Vol. 34/1, 2020.

amendment of the organizations establishing Charter in 2008, when the promotion of human rights and the protection of fundamental freedoms were incorporated to its goals. The main reference to human rights was yet achieved through the Cairo Declaration of the Organization of Islamic Cooperation on Human Rights. The declaration was first drafted in 1990 when it was strongly based on Islamic values, stating that the fundamental rights are an integral part of the religion. Later, the amended 2020 version of the document kept the reference to the Islamic law, however it strongly secularized the text.[246] The wording connects the right to liberty and the prohibition of torture in its article 4, which reads as follows:

a) *Every person has the right to liberty and security. No one shall be subjected to arbitrary arrest or detention, kidnapping or enforced disappearances. No one shall be deprived of his/her liberty except on such grounds and in accordance with such procedures as are established by law.*
b) *No person shall be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment.*
c) *No person shall be subjected to inhuman treatment while in custody; defendants shall be separated from convicted persons.*
d) *No person may be subjected to medical or scientific experiments, nor can their organs be used, without their free and informed consent and full heeding of potential medical complications.*
e) *It is the duty of the State to ensure everyone's safety from bodily harm, in accordance with its legal system and international obligations.*[247]

The text of the provision indicates that the Cairo Declaration emphasizes together the right to liberty, the prohibition of torture, the prohibition of scientific experiments without consent and the rule of law. The placement of these provisions in the initial articles of the declaration, highlights the heightened importance attributed to these rights. Additionally, we can observe similar concepts regarding illicit treatment (degrading and inhuman treatment) as those are found in other regional human rights systems. As a result, the textual foundation of the Cairo Declaration appears to be well-crafted in relation to the prohibition of torture.

[246] The Cairo Declaration of the Organization of Islamic Cooperation on Human Rights, opened for signature 5 August 1990, amended 2008.
[247] Ibid, Art. 4.

However, it is important to note that the document lacks binding authority and, as such, is not enforceable in any form.[248]

The League of Arab States is an intergovernmental organization grounded in the principles outlined in the Arab League‘s Charter, which establishes the primary governing principles of the organization. The Charter prominently highlights the League's main objective, to strengthen cooperation among its member countries. However, it is important to note that this primary document does not contain provisions related to any human rights. The situation changed significantly with the adoption of the Arab Charter on Human Rights, which integrated human rights considerations into the League’s framework of obligations. As a result, this treaty has emerged as a central document in the realm of Islamic human rights protection, marking a pivotal shift in the League’s commitment to fostering human rights standards within its member states. The Charter sets the prohibition in its article 8 as follows:

„1. No one shall be subjected to physical or psychological torture or to cruel, degrading, humiliating or inhuman treatment.
2. Each State party shall protect every individual subject to its jurisdiction from such practices and shall take effective measures to prevent them. The commission of, or participation in, such acts shall be regarded as crimes that are punishable by law and not subject to any statute of limitations. Each State party shall guarantee in its legal system redress for any victim of torture and the right to rehabilitation and compensation.“[249]

The article, seemingly reflects the international standards observed in other regional human rights frameworks. It includes physical and psychological acts as well as the traditional notions of the prohibition, i.e. cruel, degrading, humiliating and inhuman treatment. The second paragpragh demands effective measures to prevent those actions, which are declared in the first paragraph. It stipulates the absolute nature by banning statute of limitations for these acts. The non-derogatory nature is further enacted in the derogation clause having place in Article 4, where the text explicitly states that article 8, besides others, allows no derogation. Therefore, while the definition of torture may be lacking, the textual foundation for the prohibition appears solid. [250]

[248] El Fegiery, M. Competing Perceptions: Traditional Values and Human Rights. In Petersen, M. J. And Kayaoglu, T.: *The Organization of Islamic Cooperation and Human Rights*, University of Pennsylvania Press, 2019, p. 160.
[249] The Arab Charter on Human Rights, opened for signature 22 May 2004, entered into force 15 March 2008.
[250] Allam, W. *The Arab Charter on Human Rights: Main Features*, Arab Law Quarterly, Vol.28/1, 2014, p. 49.

It is certainly fair to assert that a text missing effective implementation holds little real value. The sole mechanism established by the Arab Charter for the promotion and protection of human rights is the Arab Human Rights Committee, which was formed in 2009 under the provisions of Article 45. While this independent body plays a vital role in the human rights landscape of the region, its mandate is somewhat limited in scope. Specifically, the Committee is tasked with monitoring and assessing the implementation of the Arab Charter's provisions, drawing its evaluations from reports submitted by the state parties. These reports are required to be submitted one year after the Arab Charter came into effect, with subsequent submissions following every three years thereafter.[251] This reporting system serves as a framework for states to demonstrate their adherence to human rights commitments outlined in the Charter, yet it also raises questions regarding the effectiveness of oversight and enforcement. The reliance on state parties to self report can lead to inconsistencies and potential biases in the documentation of their compliance. Consequently, while the Committee is a crucial mechanism intended to uphold the principles enshrined in the Arab Charter, its functionality is inherently constrained by the limited nature of its mandate and the dependence on member states for accurate and comprehensive reporting on human rights practices.[252]

The framework is aimed to be supplemented by the establishment of the Arab Court of Human Rights in Bahrain, however after the adoption of its Statute in 2014, the institution is still waiting for sufficient number of ratifications for establishment. Nonetheless, some scholars claim, that even if the ratification process would continue,[253] in its current form, the Statute of the Arab Court is unlikely to effectively address shortcomings or safeguard rights. In this sense we may mention some issues: no acces to the Court granted to individuals, no monitoring mechanism that supervises the execution of judgments or no inclusion of a provision related to the status of victims and their role in front of the Court.[254] Hence, for it to serve as a credible foundation for the establishment of an authentic human rights court, comprehensive amendments are necessary. In addition, these amendments must align with international standards and be conducted through a consultative and transparent process.[255]

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[251] Almakky, R.G. *Protection of Human Rights and the Arab League: A Case Study on the Syrian Arab Republic*, Journal of Islamic State Practice of Internatioanal Law, Vol. 11/2, 2015, p. 36.
[252] Magliveras, K. D. *Completing the Institutional Mechanism of the Arab Human Rights System*, International Human Rights Law Review, Vol. 6/1, 2017, p. 46.
[253] Up to date only Bahrain and Saudi Arabia have ratified the Statute enacting the Arab Court of Human Rights.
[254] Statute of the Arab Court of Human Rights, Arab League, resolution No. 7790 EA (142), 2014.
[255] International Commission of Jurists. *The Arab Court of Human Rights: A Flawed Statute for an Innefective Court*, Geneva, 2015, p. 5.

Consequently, the Islamic human rights framework faces several challenges. Firstly, the absence of universal ratification of the Charter on Human Rights leads to divergent approaches within the same region. Secondly, the Charter does not provide mechanisms for individual complaints, nor does it facilitate surprise ad hoc visits to countries, limiting the ability to effectively monitor and oversee its implementation. Thirdly, although initiatives like the establishment of an Arab Court have garnered much attention, only two countries have ratified its Statute to date. Lastly, the text of the Statute itself raises several concerns that need to be addressed.

However, it is essential to recognize that the development of a comprehensive Islamic human rights system faces several challenges, including varying interpretations of human rights within different cultural and national contexts, the frameworks established by the Arab League, the GCC or the OIC reflects an attempt to advance human rights. Indeed, the effectiveness of these initiatives can be influenced by political dynamics, socio-economic factors, and the differing levels of adherence to human rights principles among member states. As the dialog on human rights continues to evolve within these organizations, there remains a pressing need for ongoing engagement and collaboration among member states to strengthen the foundations of human rights protection in the Islamic world. By fostering a unified approach that respects cultural and religious values while embracing universal human rights norms, the Islamic human rights system would have the potential to play a crucial role in promoting justice and dignity across the region.

5.2. Association of Southeast Asian Nations and South Asian Association for Regional Cooperation

In Asia, a comprehensive human rights system that encompasses the entire region has yet to be established. One of the primary challenges to creating a pan-Asian human rights framework is the lack of a common shared identity among the 53 diverse states within the region. This diversity is characterized by a wide array of cultural, historical, and social differences that complicate the pursuit of unified human rights standards. Despite this overarching absence of a cohesive system, there are noteworthy initiatives occurring at a regional level, indicating progress toward addressing human rights issues in specific areas. Two key regional organizations, the Association of Southeast Asian Nations („ASEAN“) and the South Asian Association for Regional Cooperation („SAARC“), have mandates related to

human rights and play vital roles in promoting dialogue and cooperation among their member states.

The SAARC was founded in 1985 primarily focusing on economic and regional integration of its member states.[256] The establishing Charter only made indirect reference to the human rights, by declaring that all individuals should have the possibility to live in dignity. The organization has implemented various human rights documents, as the Convention on Preventing and Combating Trafficking in Women and Children for Prostitution,[257] the Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia,[258] the Social Charter [259] or the Democracy Charter.[260] However, as there is no general convention devoted to general protection of human rights which would include the prohibition of torture, the chapter will not further analyze the framework of the SAARC.

For decades, the protection of fundamental rights has remained a secondary focus in ASEAN's activities. However, since the early 1990s, this issue has started to gain prominence, highlighted by the adoption of the Bangkok Declaration on April 2, 1993, by several Asian countries, including all ASEAN members. This document reiterated the commitment of the signatories to uphold the fundamental rights enshrined in the United Nations system, while emphasizing the importance of sovereignty, the principle of non-interference in internal affairs, the peaceful resolution of disputes, and the right to development.[261]

The establishing document of the ASEAN Charter declares in its first two articles, that the protection of human rights is one of its goals and a foundational principle of the organization. Additionally, the Charter goes even further, when it expects a creation of an ASEAN human rights body in its Article 14: „*In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body".*[262] On the mentioned basis an ASEAN Intergovernmental Commission on Human Rights was created. However, it lacks explicit provisions empowering the Committee to conduct investigations or

[256] Up to date the SAARC has eight member states: Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka.
[257] SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prositution, 12 August 2014.
[258] SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia, 1 May 2002.
[259] SAARC Social Charter, 4 January 2004.
[260] SAARC Democracy Charter, Citizens'Initiative, 14 October 2011.
[261] See Stepień, M. *Deklaracja Bangkocka – azjatycki głos w sprawie praw człowieka*, Annales Universitatis Mariae Curie-Skłodowska, Politologia, Vol.17, 2010.
[262] Charter of the Association of Southeast Asian Nations, opened for signature 20 November 2005, entered into force 1 December 2008.

inquiries, as well as the ability to receive individual complaints regarding human rights violations. This absence of authority severely limits the Committee's capacity to address issues effectively. Furthermore, the reports drafted by the Committee do not carry any binding authority, which diminishes their impact and enforceability. Consequently, the Committee is often perceived as lacking real power or influence, leading to a characterization of its role as "toothless".[263]

Nonetheless, the Committe's first task was to create a comprehensive human rights treaty of the regional organization, i.e. the ASEAN Human Rights Declaration. The document was in 2012 unanimously adopted by all member states of ASEAN, marking a significant milestone in the region's commitment to human rights. This landmark declaration was complemented by the Phnom Penh Statement, which serves to reinforce the dedication of ASEAN Member States to ensure that the implementation of the Declaration is conducted in accordance with their commitments to various pivotal international agreements, including the Charter of the United Nations, the Universal Declaration of Human Rights, and the Vienna Declaration and Programme of Action. This alignment with established global human rights frameworks indicates the collective will of the ASEAN member countries to uphold human rights standards including their commitment to foster a culture of respect for human dignity across the region.[264]

The Declaration stipulates the prohibition of torture under the title of civil and political rights in Art. 14 as following: *„No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment".* The position of the article indicates, that the authors of the text did not consider it as essential, to include the prohibition in the initial part devoted to the main principles of the declaration. Furthermore, the wording of the prohibition is both brief and vague. Nevertheless, the text of the prohibition itself, cannot be deemed as inherently problematic. The use of short and ambiguous language typically reflects the drafters' intent to emphasize that no exceptions are permitted to the rule. Unfortunately, the current situation does not support this interpretation, as the declaration itself lacks binding authority at this time. To date, the document has received only six ratifications out of the ten required for it to attain binding status. Yet, one must question what would happen once the declaration becomes fully binding. Given that the Committee lacks the real power to enforce

[263] Bon Tai Soon, E. And Vathanaganthan, U. *A Decade of the ASEAN Human Rights Declaration. The AHRD in Disuse and ASEAN's Inability to Take Human Rights Seriously*, International Politics of South East and East Asia, Vol. 23/4, 2023, p. 4.
[264] See Duxbury, A. And Hsien-Li, T. *Can ASEAN take Human Rights Seriously? ASEAN Integration Through Law: The ASEAN Way in a Comparative Context, Plenary on Rule of Law in the ASEAN Community*, Cambridge University Press, 2019.

its reports, the enforcement of the rights enshrined in the document remains highly uncertain. Additionally, there are already several critiques surrounding the Declaration, including concerns that its text allows the considerations of the human rights based on specific regional and national contexts. This provision inevitably opens the door for arbitrary interpretations, which could undermine the very principles the declaration aims to uphold.[265] Not to mention the further article which explicitly allows limitations of human rights on the purpose of national security, public order, public health, public safety, public morality and general welfare of the people. Hence, the limitations of the human rights enshrined in the decleration fall under numerous reason when states have the possibility to derogate.[266]

The nations of Southeast Asia are marked by a rich tapestry of diverse political systems, and historically, the perspectives of their leaders regarding the significance and value of human rights have varied considerably. Unlike Europe, which characterizes itself in the Preamble to the 1950 European Convention on Human Rights as a region of like-minded nations united by a shared heritage of political traditions, ideals, freedom, and the rule of law, Southeast Asia presents a more complex landscape. While Southeast Asia as a whole recognizes the importance of human rights, the absence of a uniform understanding or commitment similar to that of European nations limits the ability of the region to collectively advocate for a standardized human rights framework. This situation underscores the necessity for ongoing dialogue and cooperation among Southeast Asian nations to bridge these divides and work towards a more unified approach to human rights that respects the region's diversity while advancing the universal principles of dignity and justice.[267]

5.3. Concluding remarks on the other human rights systems

In the region of Asia, differing historical contexts, cultural backgrounds, and political ideologies have led to a range of beliefs about what human rights entail and how they should be prioritized within their societies. This divergence makes it challenging for Asian nations to present a cohesive identity in terms of human rights commitments. Each country approaches the concept of human rights from its unique cultural and political vantage point, often leading to varying implementations and interpretations of these rights.

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[265] Article 7 of the ASEAN Human Rights Declaration, opened for signature 19 November 2012.
[266] Ibid, Art. 8.
[267] Renshaw, C.S. *The ASEAN Human Rights Declaration 2012*, Human Rights Law Review, Vol. 13/3, 2012, p.577.

As regard to the prohibition of torture, we observe similar as well as divergent trates. The notions of illicit treatment are likewise included in the understanding of these regions. Hence, the interpretation that the prohibition entails different levels of violation is universally accepted. Nonetheless, there are significant gaps in the most influental part, the norms enforcement. We have observed that none of these systems have a similar enforcement mechanism where individuals find a way how to protect their dignitiy from the national authority.

These regional efforts, while significant, highlight the challenges that remain in achieving a unified Asian human rights system. The variability in commitment to human rights standards, along with differing political will and cultural contexts across the region, continues to impede the development of a comprehensive human rights framework that could effectively safeguard the rights of all individuals in Asia. Therefore, ongoing dialogue and cooperation among nations will be essential to bridge these divides and strengthen human rights protections across the continent.

Under the auspicies of the Islamic framework the OIC drafted the Cairo declaration, enacting numerous human rights interpreted through the Islamic perspective. Althought, the OIC enacted the Independent Permanent Human Rights Commission in 2005, its powers are limited, as it only performs consultations and presents recommendations.[268] The GCC and its Gulf Declaration of Human Rights is likewise a soft-law instrument offering no possibilities for justice for the victims. If we dwelve into the realm of the non-islamic south and southeast Asia we do not find any better situation. The ASEAN offers the textual basis through the ASEAN Declaration of Human Rights, however this document has no binding value. Not to mention the ASEAN Intergovernmental Commission on Human Rights, which has no real possibilites to conclude investigation or effectively enforce its reports. Further, if we analyze the SAARC, we realize, it has no provision prohibiting torture in its documents.

With respect the UNCAT and its implementation, it is evident that, despite broad global ratification, significant gaps in acceptance persist within the Asian region. Although the treaty was generally ratfified, with the exception of India, reservations upon ratification were made by numerous countries, such as: Bangladesh, China, Indonesia, Kuwait, Oman,

[268] The Arab Human Rights System, Annex to the ABC of Human Rights for Development Cooperation, FDFA Bern, 2017, p. 8.

Pakistan, Saudi Arabia and others. Vast majority of this reservations stipulate, that the country does not recognize the jurisdiction of the Committee against Torture.[269]

As a consequence, the region of Asia presents a significant absence of an enforceable prohibition against torture, leading to critical concerns regarding human rights protections. Alarmingly, approximately one-third of the world's population resides in regions where there is no effective safeguard for this fundamental right, which is essential for protecting human dignity. This lack of protection leaves countless individuals vulnerable to abuses that infringe upon their basic rights. The existence of such a gap in protections, serves not only as a moral failing but also as a challenge to the credibility of global human rights efforts. Without a steadfast commitment to combating torture and advocating for the enforcement of these rights, the promise of universal human dignity remains distant for many. Consequently, it can be asserted that the character of the prohibition of torture is not universally recognized or accepted across all countries.

[269] Status of the UN Human Rights. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, [Online], Available at: https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-9&chapter=4&clang=_en (accessed 01.05.2025).

B. Specific Aspects of the Prohibition of Torture

The first part of the dissertation aims to provide a comprehensive overview of both the universal and regional legal and judicial frameworks that establish the fundamental defining elements of what constitutes the human right known as the prohibition of torture. After observing the phenomena from textual point of view, the author came across numerous specific issues which are strongly connected to the topic of the prohibition. Some of them are perhaps more progressive, like the interpretation of the norm as a tool in climate justice, or the demand for corporate accountability for violating the prohibition in extraterritorial matters. On the other hand, some of the topics are troubling the scholars for years, as the war on terror and the use of coercive measures by authorities, or the treatment of people seeking asylum in foreign country. Nonetheless, as all of these topics have a significant impact on the understanding what constitutes prohibition of torture, the author deemed it necessary to consider them individually.

Furthermore, the analysis of these specific topics will be highlighted by the differences among various regional human rights systems, presenting how each region observes these specificities, and *vice versa* how the specific issues influence the interpretation and enforcement of fundamental rights in the region. By considering these unique aspects of the topic, the author is able to present a comprehensive conclusion to the research, summarizing the findings and insights collected throughout the investigation.

VI. Corporate Accountability for Torture

A growing area of numerous national legislations establishing criminal responsibility of non-state legal actors as well as several news reporting suspicious activities of big companies in third world countries, have recently aroused interest of the public in the matter. These violations and allegations of violations brought corporate, trade and investment world into the realm of human rights litigations. Claims against corporations importing slave labour, claims regarding trafficking and exploitation as well as possible links to acts of torture present, that the human rights "business" can mean economic advantage or a series of obstacles for trade actions.[270]

Therefore, the question how broadly can different regional human rights courts interpret the applicability of international human rights treaty norms arises. Including the question of their own institutional powers to deliberate in extraterritorial matters. Nevertheless, the leading opinion is concerning the states obligations and the compliance of member states with the human rights norms, in numerous cases this obligation may constitute an indirect obligation to demand the same adhering to the norms from its entities, embodying legal entities established by their law.[271]

The involvement of corporate entities in human rights violations is sadly not a new phenomenon. The British East India Company established in 1600 and functioning until 1874 was regularly associated with famine, drug trafficking and even slave trade. The company was administered by the English and Irish Monarchs and thus it was not subject to any rules, nonetheless human rights.[272] The situation has definitely rapidly changed as the corporations operated independently or form a partnership with states. The modus operandi of the human rights violations has changed as well. The violations are mainly indirect actions of companies, providing assistance or funding the perpetrators of these offences. Additionally, these violations occur mostly in developing countries.[273] Some things have however remained unchanged, or seems to remained unchanged. The *raison d'etre* of the violations is still gaining economic advantage. A pessimist may add that the presence likewise lacks of a proper enforcement mechanism applied to corporate entities.

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[270] Duffy, H. *Strategic Human Rights Litigation. Understanding and Maximising Impact*, 2018, p.11.
[271] Scott, C. *Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms*, Hart Publishing, 2001. p. 57.
[272] J. Keay. *The Honourable Company: A History of the English East India Company*, London: Harper Collins Publishers, 1991, pp.430-1.
[273] Deva, S. *Regulating Corporate Human Rights Violations. Humanizing Business*, Routledge, 2012. p.5.

One of the main leading achievements of the modern international law has been the development of legal instruments, including norms enhancing fundamental values of the entire international community. Renowned judges of international courts and most admired scholars and lawyers of the International Law Commission mentioned some of these rights as undoubtedly having *ius cogens* nature.[274] As it has already been submitted, prohibition of torture and prohibition of slavery gained this "honorary" position. Fortunately, violations of the prohibition of slavery are rather rare, nevertheless violations of the prohibition of torture by corporate actors have not diminished. There perhaps isn't a more important human right which is still regularly ignored and avoided including ill-minded justifications. Regretfully, actions of corporate entities are not exceptions in the matter, hence it is necessary to turn the light to the issue.

The standards ensuring the respect for internationally recognized human rights are set in different ways. In case of the prohibition of torture, the right itself is successfully included in many binding human rights treaties and conventions thorough various legal systems of the world. Although the prohibition, as being part of the *ius cogens*, is *de jure* not questionable, analysis of the continuous case-law shows the loopholes in the effectiveness of the protection of the right. The *de facto* situations in numerous countries provide evidence of the regularly applied limitations to the prohibition. The goal of these limitations is to give space to public authorities to conclude „exceptional" interrogations. In this regard it is appropriate to ask whether the right is in fact absolute and non-derogatory and whether there can be done more in order to achieve a complete *de facto* ban on torture.

The research in this chapter will be firstly devoted to the analysis of the substantive and procedural safeguards set forth in the fundamental treaties establishing the prohibition of torture and further dealing with the question of corporate accountability for human rights violations on the example of prohibition of torture. Even though the prohibition of torture is widely recognized and integrated into the national framework of countries, the application is strongly individualized. Yet this runs contrary to the nature of the absolute right and to the expectations, based on the development of international legal framework of human rights after W.W.II.

The research will be focusing on the establishment and interpretation of the issue of corporate accountability in two regions of the world. The first will be devoted to the European framework, particularly to the Council of Europe and its doctrine established by the European

[274] Nagan, W.P., Cartner, J.A.C., Munro,R.J. *Human Rights and Dynamic Humanism*, Brill Publishing, 2017, p. 436.

Convention for Human Rights and Freedoms and examples of cases in front of European national courts. This will be compared to the situation in the United States of America, in order to present how different approaches may impact the human rights litigation connected to corporate entities. The particular instruments of the legislation (international or national) establishing the basis for accountability are rooted in natural law and international standards, with special focus on the basic principles common to all. However, it is more than appropriate to wonder if the monitoring mechanisms, court's decisive work and the following sanctions are able to achieve the desired results?

6.1.European Framework on Corporate Entities and Human Rights

As already mentioned, the European framework is set upon the ECHR established by the Council of Europe. The key provision is Art. 1. establishing the personal scope of the convention, by stipulating that everyone's rights shall be respected a secured by the ratifying countries.[275] The Convention in later articles sets, that the European Court of Human Rights has jurisdiction over inter-state and individual claims.[276] Although Art. 1 does not explicitly interpret "who" are the everyone, Art. 34 refers to applications accepted from persons, non-governmental organizations or group of individuals who claim to be the victims. The jurisprudence of the ECtHR is furthermore widening this enumeration by enhancing applications by corporate entities.[277] Nevertheless, the inclusion of legal entities as bearers of rights can be derived from several substantive provision of the Convention. Protocol No. 1. which sets, that every natural or legal person is entitled to the peaceful enjoyment of his possessions.[278] Further an indication can be found in Art. 10 of the Convention, where the freedom of expression shall not prevent the State from requiring the licensing of broadcasting, television or cinema enterprises, hence expressly referring to various types of legal entities.[279] The mentioned provisions present that certain scope of rights and freedoms apply to legal entities. On the other hand, the case-law of the ECtHR presents, that regarding rights especially linked to humanity as such, there can be found no link to legal entities. In case of K.H.W v Germany in 2001 the ECtHR stipulated that the right to life is an inalienable attribute of human beings. Furthermore, the decision in the Verein Kontakt-Information-

[275] Article 1 of the European Convention on Human Rights and Fundamental Freedoms.
[276] Ibid. Article 34-35.
[277] See ECtHR, Autronic v Switzerland. Application No. 12728/87, Judgment, 22 May 1990.
[278] Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, ETS. No. 009.
[279] Article 10 para 3. of the ECHR.

Therapie case proves that in the matter of prohibition of torture there is no serious discussion, regarding its application to others than individuals.[280]

Still, the corporate entities are considered as bearers of numerous human rights in the European framework of human rights protection. Nevertheless, these entities can be on the other side of the coin, i.e. the violators of human rights. The first introducing article of the ECHR sets, that it is the Contracting states responsibility to secure the protection of the human rights scope enhanced in the Convention. The jurisdiction of the ECtHR hence applies to claims solely against the Contracting States. Based on the doctrine established by the ECtHR the States have positive obligations to protect and secure the protection of human rights. Consequently, it means that preventive as well as sanctioning measures have to be applied properly at the national level. If States fail to do so, they can be held liable for the lack of such actions. In regard the corporate accountability this means that States have the duty to either prevent violations from the side of corporate entities or subsequently apply proper sanctions through retributive justice.[281]

Nevertheless, the proper sanctioning of the corporate actions give rise to several questions, which give rise to a possibility of international liability. One of the most relevant issues is the question how to properly punish those companies which have business activities in several countries around the world and alleged violations occurred in non-contracting states. The States investigations in these matters can be indisputably based on the residence of a European company. Even though the gathering of the evidence brings surely numerous difficulties, States are similarly bound by the positive obligations doctrine, demanding proper sanctioning for human rights violations.[282]

The states ensure by their legislature and judiciary the protection of rights stemming from the ECHR. This horizontal indirect effect means that the applicant can demand from the judge to provide protection against another private defendant. Consequently, private entities, including legal entities, have the obligation not to violate another person's human rights. Nonetheless, the following is done on the basis of the ECHR-proof national tort law.[283] The

[280] See ECtHR, Verein Kontakt-Information-Therapie v Austria, Application No. 11921/86, Judgment, 12 May 2015.
[281] See Kaleck, W. And Saage-Maas, M. *Corporate Accountability for Human Rights Violations Amounting to International Crimes*, Journal of International Criminal Justice, Vol. 8/3, 2010.
[282] See Akandji-Kombe. J.F. *Positive Obligations under the European Convention on Human Rights. A guide to the implementation of the European Convention on Human Rights*, Human rights handbooks, N. 7, 2007.
[283] van Dam, C. Human Rights Obligations of Transnational Corporations in Domestic Tort Law. In Černič, J.L. and Van Ho, T.: *Human Rights and Business: Direct Corporate Accountability for Human Rights*, Wolf Legal Publishers, 2015, p. 484.

ruling of the French court in the LaFarge cement factory, discussed below is certainly an example for such application.

The question of proper enforcement of human rights stemming from the ECHR is strongly connected to the extraterritorial applicability of this treaty. The extraterritorial jurisdiction enables authorities to properly use its competence and enforce rules which are beyond its territory. Undoubtedly, there has to be a proven link to the elements of the action, such as personal subjectivity. The exercise of this application can be committed by prescription, adjudication or enforcement.[284] The notion itself is not new. It was already contemplated in the famous Lotus case in front of the Permanent Court of Justice in 1927. In the mentioned case it had been pointed out, that the exercise of extraterritorial enforcement is the most objectionable and problematic.[285] However, the mentioned extraterritoriality can represent ground for a claim in case the companies fail to fulfill its obligations in this matter.

Extraterritoriality enhances active nationality principle justifying enforcements of legal acts of States on its own national subjects, i.e. persons and legal entities as well. Legal entities with their permanent residence have therefore obligations to act in accordance with the rules set in that State.[286] If companies have violating activities elsewhere, states are not only enabled but obliged to enforce the obligations stemming from the ECHR. If States fail to do so, the ECtHR jurisdiction can step up. Yet, the most basic question comes up. Who would be the one applying in front of the ECtHR? E.g. if companies are linked to violent acts, such as torture, perpetrated in a thirdworld country, what is the chance of a victim coming up with a claim. Whilst the mentioned has small chances, what would be the next step? Who would be responsible for the proper investigation of these cases?

The investigation would be definitely tricky. The claim has to include numerous elementary evidences. First of all, there has to be sufficient evidence of the *actus reus*, i.e. that the violations of articles of ECHR have indeed happened. Afterwards, there has to be a proven casual nexus, a link between the legal entity and these actions. The link can be represented by either the fact the violating actions were done by employees or management or that the company funded, enabled, aided, abetted or by any means contributed to the violations. The *mens rea*, reason behind these actions is to gain economic advantage for the company and its shareholders. Besides, the investigator has the duty to check whether the

[284] Kamminga, M. Extraterritoriality. In Wolfrum, R.: *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2020, p.2.
[285] Permanent Court of Justice, The Lotus case (France v Turkey), Series A. No. 10, Judgment, 7 September 1927.
[286] Helenius, D. *The If, How, and When of Criminal Jurisdiction- What is Criminal Jurisdiction Anyway?,* Bergen Journal of Criminal Law and Criminal Justice, Vol.3, Issue 1, 2015, p.37.

local authorities did not or could not sanction properly the legal entity performing its activities on the territory. Afterwards, the applicant can present the fact that the State, where the company was established failed to sanction the entity properly.[287]

Nonetheless, as proven above, even if the ECHR doctrine would not give rise to properly sanction corporate entities (which it does), there exists several principles applied in the Roman law system, how to stop perpetrators from avoiding justice. These principles stem from the Harvard Draft Convention on Jurisdiction with Respect to Crime from 1935 and European criminal law theory refers to these principles as establishing rules for jurisdictions which can be used when necessary.[288]

As the active nationality principle is the most significant it's the most common base for establishing jurisdiction and the most effective how to sanction legal entities, which have connections to human rights violations in developing countries. The passive personality jurisdiction principle, which refers to a jurisdiction where States have the possibility to enforce liability for actions abroad where their own nationals suffered harm. The link is therefore based on the victim status. This type of principal jurisdiction has gained attention as it had been included in texts of several international treaties. The UNCAT Convention in Art. 5 establishing jurisdiction when violation of the prohibition of torture occur, stipulates the possibility to establish jurisdiction when the victim is a national of that State if that State considers it appropriate. Consequently, the mentioned application can result in concurring jurisdictions and also in violation of sovereign powers of another state. On the other hand, if the State, which has territorial jurisdiction and therefore has the duty to investigate the alleged violation fails to do so and does not extradite either, it violates several articles of the Convention and international customary law as well. [289]

The protective jurisdiction principle enables the States to have jurisdiction in situations where events happen abroad and neither of the persons enjoy the nationality of the concerned States. However, the criminal events may constitute a threat to its essential and core interests. In this sense the questions at hand concern national security issues which can have the form of a possible terrorist attack or a *coup d'etat*. As it is obvious from the

[287] Nemeth, Ch. P. *Criminal Law*, 2nd edition, CRC Press, 2012, pp. 33-79.
[288] Harvard Research in International Law: Draft Convention on Jurisdiction with Respect to Crime, Supplement to the American Journal of International Law, 1935, pp. 437–635.
[289] Article 5. 1 c) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987.

character of the principle itself, the application is rather intricate and the loose interpretation may cause the issues such as abusive enforcement.[290]

The universal jurisdiction represents a universal aid, as it can be applied irrespective of any casuality just on the basis that certain horrendous crimes have to be sanctioned in order to provide international justice. The goal of the mentioned jurisdiction is to protect the interests of the humanity as a whole. With higher value, higher complexity of the issue comes. The principle could be applied to the four international crimes, such as genocide, war crimes, crimes against humanity and aggression. Nonetheless, even with those four crimes the situation is not clear-cut as the Rome Statute establishing these crimes is not universally ratified over the world.[291] Not to mention the Kampala amendment including the crime of aggression into the Rome Statute which lacks ratification even from the member states which signed the treaty. Nonetheless, the mentioned core crimes, case-law and the works of respected scholars regularly mention prohibition of torture as a separate crime giving rise to universal jurisdiction.[292]

The rise or at least the attempt of rise of universal jurisdiction can be currently observed in Europe. In March 2023 a case was filed in Germany for crimes committed in Myanmar before and after the coup on the basis of the universal jurisdiction. The claim was brought against senior Myanmar military generals and other actors which allegedly committed genocide, war crimes, and crimes against humanity. In Germany the legal grounds for the Myanmar case served the German Code of Crimes against International Law, being the result of the implementation procedure of the Rome Statute.[293] The following example proves that the European countries have the operational scope to deal with the impunity even in African or Asian armed conflicts. The involvement of a legal entity would make the already problematic case more complex, still not unfounded.

As proven above, there are numerous methods in the doctrine how to enforce rules of criminal liability on companies. However, we have to add that international law does not provide any clear-cut jurisdictional rules and the normative significance of these jurisdictional

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[290] Kamminga, M. Extraterritoriality. In Wolfrum, R.: *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2020, p.13.
[291] Hassanová, R.L. *Implementácia Rímskeho štatútu do práva Európskej únie*, Vývojové determinanty verejného práva v európskom priestore: vedecký zborník*,* Vysoká škola podnikání a práva, Prague, 2021, p. 46.
[292] Bergsmo, M. Complementarity and the Exerice of Universal Jurisdiction for Core International Crimes, Torkel Opsahl Academic Publisher, 2010, p. 218.
[293] Pelliconi, A. M. and Gregorio, S. New universal jurisdiction case filed in Germany for crimes committed in Myanmar before and after the coup: On complementarity, effectiveness, and new hopes for old crimes, [Online], Available at: https://www.ejiltalk.org/new-universal-jurisdiction-case-filed-in-germany-for-crimes-committed-in-myanmar-before-and-after-the-coup-on-complementarity-effectiveness-and-new-hopes-for-old-crimes/ (accessed: 14 August 2023).

principles is often disputed.[294] Hence, the States still find loopholes, how to avoid enforcing the sanctioning mechanism if it seems as too complicated or too "unfavourable" to punish a powerful company. The complexity of the issue is demonstrated in the recent national case-law in Europe, which will be shortly presented as follows.

In 2016 two non-governmental organizations (Sherpa and the European Center for Constitutional and Human Rights) and eleven former Syrian employees filed a complaint against Lafarge cement company in France claiming that the company shall be accountable for human rights violations committed in Syria in 2013 and 2014. The claim included numerous allegations of violating the French criminal code, including complicity in war crimes, crimes against humanity as well as intentional endangerment of people. According to some of the evidence including testimonies, there were indications that the company may have entered, via third party hired intermediaries, into negotiations with the leaders of the Islamic State of Iraq and Syria. These negotiations were aiming to secure raw material necessary for production. Additionally, there were some statements concerning a link between the company and the Islamic State of Iraq and the Levant. The link were several official ISIS passes, which were gained by payment of fees for the movement through checkpoints.[295] During the investigation procedures the company management has admitted itself, that the Syrian subsidiary branch of the company has paid armed groups in order to protect the plant from attacks. The groups which were receiving payment through intermediaries were the ISIS and the Al Nusra Front, both understood today as terrorist organizations.[296] The primary arguments on the side of the company were resting upon the false assumption that the French authorities had no formal jurisdiction to prosecute charges allegedly committed abroad. These claims were fortunately rejected by the French court. Even though the French Supreme Court ruled partly in favour of the petitioner in January 2024, the ruling was mostly related to the bad circumstances of labor in territories affected by an armed conflict. The decision of the Court was thus applying Art. 8 of the Rome I regulation, i.e. private international law.

Although the ECHR and national tort law are becoming highly connected, the protection of human rights provided by the treaty should be considered as minimum standard.

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[294] Currie, R. *International and Transnational Criminal Law*, Toronto: Irwin Law, 2010. p. 79.

[295] Case report of the European Center for Constitutional and Human Rights, [online], Available at: https://www.ecchr.eu/fileadmin/Fallbeschreibungen/Case_Report_Lafarge_Syria_ECCHR.pdf (accesed 02.03.2025)

[296] ISIS and Al Nusra Front are on blacklists of several states. E.g. The USA State Department has included ISIS on the list of foreign terrorist organization in December 2004 and the Al Nusra Front in December 2012. This was followed by the identical approach of several states such as Australia in March 2004 and March 2013. Both organizations are on the list of United Nations Security Council Consolidated List of individuals and entities subject to measures imposed by the Security Council.

The protection of human rights is still based primarily on domestic legislation and its development in still in the hands of the domestic courts.[297] Even though the mentioned decision in the Lafarge case had implications only for transnational civil litigations, the case itself may be a possible shift in the corporate accountability department. It proves that there might be a possibility to overview the actions of companies in developing countries.[298]

Another example of a national trial concerning a legal entities possible violations of human rights is the recent case from 2023 in front of the Stockholm District Court against two former executives of the Swedish oil company Lundin Oil. The claim was concerning allegations of links of the company with grave war crimes committed in South Sudan by its government. The charges were aiding and abetting the actions falling under the notion of international crimes during the period of 6 years (1997-2003). Several evidence proves that the company has entered into agreement with the government led that time by the infamous president Omar Al-Bashir (subject to ICC Arrest warrant). The agreement's aim was to provide favourable conditions for the company's functioning in the region, including the protection provided by Sudanese military and regime-affiliated militia. Several testimonies of witnesses claim that in order for the continuing oil exploration the company let Sudanese government do the "dirty job" including grave violations of international humanitarian law. According to the indictment of the Court, the defenders, i.e. management of the company had knowledge of the brutalities and hence has to be held responsible for funding these operations.[299] The case is currently pending as witnesses still provide testimonies. The Lundin case was a triggering factor in another pending trial in Europe concerning Austrian OMV AG for abetting war crimes in South Sudan. The claim rests upon the assumption that the OMV AG owned 26% of the Lundin Oil Company consortium, therefore having a noteworthy influence on crucial decisions, such as cooperation with the government of Sudan.[300] Nevertheless, even though these cases have not been decided yet, they prove that the

[297] van Dam, C. Human Rights Obligations of Transnational Corporations in Domestic Tort Law. In Černič J. L. Van Ho, T.: *Human Rights and Business: Direct Corporate Accountability for Human Rights*, 2015, p. 484.
[298] Pauchar, H. French Supreme Court ruling in the Lafarge case: the private international law side of transnational criminal litigations, 2024, [Online], Available at: https://conflictoflaws.net/2024/french-supreme-court-ruling-in-the-lafarge-case-the-private-international-law-side-of-transnational-criminal-litigations/ (accessed 12.12.2024).
[299] Inidcted with complicity in grave war crimes- today the trial in the Lundin Oil case begins in Sweden, 2023, [Online], Available at:. https://crd.org/2023/09/05/indicted-with-complicity-in-grave-war-crimes-today-the-trial-in-the-lundin-oil-case-begins-in-sweden/ (accessed 12.12.2024).
[300]Organized Crime and Corruption Reporting Project, 2024, [Online], Available at: https://www.occrp.org/en/daily/18702-austria-s-omv-ag-sued-for-abetting-war-crimes-in-south-sudan (accessed 12.12.2024).

prosecutors in their national framework tend to investigate more frequently the actions of companies which might have links to grave breaches of international law.

A notable case is from the Netherlands from 2012 concerning Ashraf Ahmed El-Hojouj v. Harb Amer Derbal et al. (Libya), which addresses issues of torture and extraterritorial jurisdiction. The applicant a Bulgarian-Palestinian national, filed a claim in The Netherlands after being illegally detained and tortured by the Libyan regime, which had accused him of infecting 393 children with HIV. After being forced to confess under torture, the applicant was sentenced to death but was later pardoned and released. Despite the absence of the defendants, the applicant managed to claim for justice in The Netherlands, where he had been granted refugee status, for the international crimes committed by the Libyan regime. The District Court in The Hague took up the case, asserting international jurisdiction under article 9(c) of the Dutch Code of Civil Procedure. This article allows Dutch courts to claim jurisdiction if it would be unreasonable to expect the applicant to seek justice in a foreign court. The court thereby established itself as a *forum necessitatis*, to prevent the denial of justice due to the defendants' absence. The court recognized that although enforcement of the judgment might become a political issue, delivering a judgment in favor of El-Hajouj was crucial for justice. The decision by the District Court of The Hague exemplified universal civil jurisdiction, allowing for reparations against the Libyan officials responsible for the applicants' torture. By acting as state agents, these officials implicated the Libyan State in international criminal responsibility for severe human rights violations. The Dutch court in the mentioned case used the principle of universal jurisdiction in order to uphold human rights and provide justice.[301]

The above-mentioned examples, proved the symbiotic relationship between international and national human rights. International human rights law demands certain behavior from the states, on the other hand national courts are able to continuously interpret and apply corporate responsibility as an obligation of private actors. Thus, these obligations are more and more becoming a real obligation not just a mere moral demand.

6.2.American Framework on Corporate Entities and Human Rights

When bringing a foreign liability claim before the USA court, the applicant has to present that the court has both personal and material (subject-matter) jurisdiction over the

[301] The Hague District Court, Ashraf Ahmed El-Hojouj v. Harb Amer Derbal et al. (Libyan Officials), Case No. 400882/HA ZA 11-2252, Judgment, 21 March 2012.

issue. The common law system in the USA however enables a quite wide margin for discretion in the matter. [302] The constitutional limit sets the bar to the "minimum contacts" of the defendant with the forum. This we might call as effects jurisdictional principle, as the country establishes the right to adjudicate those claims which have a substantial territorial effect.[303] The generous approach implies both for corporate defendants, which hence fall under the lenses of the courts even in situations when it has business activities in jurisdiction of the court. The Supreme court has recently limited this wide understanding in its case-law but the more extensive application in contrast to the European one is still evident. With regard to the subject matter the American courts have jurisdiction over cases arising under the Constitution, federal law and treaties which were concluded by the federal state.

The Alien Tort Statute ("ATS") [304] has been on this ground a proper foundation for several cases. The mentioned legislation was adopted in 1789 for the reason of preventing and properly enforcing breaches of international customary law. The sanctions at a time were fundamentally aimed to fight piracy in the Caribbean.[305] Nonetheless, later it became notorious for allowing foreigners to claim in front of American federal courts for infringements of customary international law or treaties to which USA is a party. Already at the beginning of this century the first court decisions were presented, which held corporations liable for variety of violating activities, such as complicity in killings, enforced disappearance, environmental damages as well as torture. Interestingly, several scholars claim that in the USA's justice system it proved to be easier to claim for justice and remedies against multinational corporations than to demand justice directly from states.[306]

The ATS enables the district courts to have jurisdiction of any civil action by an alien for a violation of the federal law and treaties of the USA. This presented for years hope for numerous international non-governmental organisations dealing with human rights to achieve justice in claims against transnational corporations. Moreover, the legislation allowed non-nationals to sue companies who have part of their operations in USA, even though the alleged

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[302] Born, G.B. Et al. *International Civil Litigation in United States Courts*, 4.edition. Austin: Texas: Wolters Kluwer Law and Business, 2007.

[303] Estey,W. *The Five Bases of Extraterritorial Jurisdiction and The Failure of the Presumption Against Extraterritoriality*, Hastings International and Comparative Law Review, Vol. 21, 1997, p. 181.

[304] Title 28 of the United States Code originally enacted as part of the Judiciary Act in 1879, The Alien Tort Statute § 1350.

[305] Kontorovich, E. *A Tort Statute with Aliens and Pirates,* Northwestern Universtiy School of Law Faculty Working Papers, Paper 219/2012, 2012.

[306] Černič J. L. Van Ho, T. *Human Rights and Business: Direct Corporate Accountability for Human Rights*, 2015, p. 12.; Ratner, S.E. *Corporations and Human Rights: A Theory of Legal Responsibility*, Yale Law Journal, Vol 111, 2001, pp. 443-476.; Stephens, B. *The Amorality of Profit*, Berkeley Journal of International Law, Vol. 20, 2002, pp. 45-48; Aguirre,D. *Corporate Liability for Economic, Social and Cultural rights revisited: The Failure of International Cooperation*, California Western International Law Journal, Vol. 42, 2011, p.123.

violation happened outside of the country. According to a research from 2013 the USA courts have dealt with more than 100 above mentioned cases, several of them involving torture.[307]

The effective functioning of the sanction mechanism in matters related to corporate accountability in the USA was questioned after the Kiobel v Royal Dutch Petroleum Co., which seemingly ended most transnational claims under the ATS.[308] The case was brought by Nigerian applicants against Shell in 2012, who claimed that the multinational company aided and abetted the Nigerian dictatorship and their grave breaches of human rights, including illegal executions, crimes against humanity and torture. One of the trials core questions was whether the USA court has the jurisdiction under the ATS act over activities of a Dutch/British company managed by USA citizens in CEO positions. The scientific public basing on 30 years of practice of the court received a surprising decision, as the court altered its previous jurisprudence when it ruled, that it does not have the ability to hear the case, as it lacks "touch and concern" with the USA including "sufficient force".[309] The Kiobel case concerns the topic of universal jurisdiction. Even though international law does not prohibit it and is widely known in the doctrine, there is no explicit authorization for its use either. It is therefore the prerogative of states to develop its content and status under international law. The decision thus ruled that there cannot be a demand for such jurisdiction on the basis of weak links to the country.[310]

In the context of prohibition of torture, the American Framework has provided the legislative basis by the Torture Victim Protection Act setting the private right of action for torture victims. The Act gives standing in front of the USA court, for both foreigners and citizens for acts of torture or extrajudicial killing committed abroad. The wording of the law stipulates that one is also subject to liability when being aware that the other's conduct constitutes a breach of duty or it gives substantial assistance or encouragement to perform alike. The necessary requirement is similarly to the European context the nexus to the act itself. Hence the aiding and abetting requires a *mens rea* of knowledge and the *actus reus* of a substantial assistance. The entity has to be sufficiently involved in the primary violation in

[307] Goldhaber, M.D. *Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard*, UC Irvine Law Review, Vol. 3/ 127, 2013, p. 128-129.
[308] Supreme Court of the United States, Esther Kiobel, Dr. Barinem Kiobel et. Al. v Royal Dutch Petroleum Co. Et.al, No. 10-1491. 569.U.S. 108, Judgment, 17 April 2013.
[309] Ruggie, J. Kiobel and Corporate Social Responsibility: An Issues Brief, 2012. [Online], Available at: https://media.business-humanrights.org/media/documents/files/media/documents/ruggie-kiobel-and-corp-social-resonsibility-sep-2012.pdf (accessed at 12.11.2024)
[310] Colangelo, A.J. *The Alien Tort Statute and the Law of Nations in Kiobel and Beyond*, Georgetown Journal of International Law, Vol. 44, 2013, p. 1341.

order to be connected to it.[311] In cases concerning torture the USA Courts have therefore the possibility to base their jurisdiction on the mentioned Act or the UNCAT convention. Additionally, they can refer to the customary law stemming from the Inter-American Convention to Prevent and Punish Torture thus combining the jurisdiction from national legislation and jurisdiction stemming from the *ius cogens* nature of the prohibition of torture.[312]

Although the U.S. Supreme Court in 2012 decided in the Mohamad v Palestinian Authority, ruling that only individual humans can be sued under the mentioned act, the mechanism previously used for corporate accountability in USA can be presented on some older cases. A trial in Northern district of California in 2008 concerned the case of Bowoto v Chevron petroleum company. The allegations included information about the knowledge, direction and approval of the Chevron management of human rights violations including torturous acts committed in Nigeria. The allegations claimed that the links can be traced back to the management of the subsidiary as well as the parent company. The evidence was based on proofs of meetings of employees with the military and police forces. The allegations additionally included that the company provided funding, transportation, intelligence information and manpower as well to oversee the attacks for their economic benefit.[313] The case seemed to be successful for the applicants at first sight, however the decision of judges was later altered to the contrary. The last drop denying any possible justice in the case was the already mentioned decision in the Mohamad v Palestinian Authority case.

The situation was similarly set up and ruled in the Cardona v Chiquita case in front of the Florida district court in 2014. The allegations were concerning activities in the period of seven year from 1997 to 2004 in Colombia. Several evidence, provided information that the well-known producer and distributor of agricultural products paid and armed the Colombian paramilitary groups through a secret slush fund. Their aim was to systematically intimidate those living in banana growing regions in the Gulf of Uraba. The hearings were questioning whether the prior managers helped to approve and organize the financial support for groups conducting grave human rights violations, including illicit treatment. Nonetheless, the court in the case dismissed the appeal on the grounds that it lacks jurisdiction in the matter. Moreover,

[311] Torture Victim Protection Act, Pub. L. N. 102-256, 106 Stat. 73 codified at 28 U.S.C, 1992, para. 1350.
[312] Plasencia, R. *Suing the Aiders and Abettors of Torture: Reviving the Torture Victim Protection Act*, Minnesota Law Review, Vol. 3310, 2021, p. 2087.
[313] United States District Court of Appeals for the Ninth Circuit, Bowoto v. Chevron Corp., No. C 99-02506 SI. 557 F. Supp. 2d 1080, 10 September, 2010.

the court rather poetically mentioned, that it cannot decide otherwise adding, that the dissenting opinions of judge colleague's may guide the USA's foreign policy in the future.[314]

Finally, it seems as USA is recently experiencing a step back in the field of corporate accountability mechanisms. The brave normative basis stemming from the ATS and TVP were providing great possibilities how to limit and possibly stop the activities of those multinational corporate entities, which were abusing their power on territories outside the glance of USA. The Mohamad v Palestinian Authority in 2013 stopped these kind of extraterritorial-basis judgments. It is upon the reader to imagine what are the reasons behind this step. However, from the human rights "believer" point of view, the recent jurisprudence of USA may seem as a step backward.

6.3. Concluding remarks related to issues of corporate entities

Although there is some evidence proving that the topic of corporate accountability for human rights violations might gain universal character, on the basis of the UN legislation we cannot find binding documents in the matter. The Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework" are providing a basis for the universal demand, however as the document is part of the Human Rights Council resolution it is generally not binding.[315] The resolution was the result of a research undertaken by professor John Ruggie, who had been appointed as the United Nations Secretary-General's Special Representative on the issue of human rights and transnational corporations and other business enterprises. The aim was to make human rights a standard part of companies risk management in order to limit the occurrence of the corporate related human rights harm. The document presents the duty of states in the matter, the corporate responsibility to respect human rights and principles of the access to remedy.[316]

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[314] United States Court of Appeals for the Eleventh Circuit, Liliana Marcia Cardona, John Doe, Angela Msria Henao Montes et. Al. v Chiquita Brands International and Chiquita Fresh North America, No. C 12-14898, 24 July 2014.

[315] It should be mentioned that the Council is probably the highest universal human rights organism at the international level and the resolution had been unanimously accepted. This resolution is indicating an existence of a common understanding of the issue by the international community. Some authors go even further and consider such uninamosity as the first step towards a customary rule. The aim is clearly to present the document as an internationally recognized framework of standards. Consequently this would mean the transformation of a soft law instrument into a customary obligation. Nevertheless, even the author observes a certain shift in the understanding of soft law, she assumes that the transformation of guidelines is currently unlikely.

[316] Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework", No. 1/HRC/17/31, Resolution No. 17/4, 16 June 2011.

Nonetheless, the only decisions which can be considered as having significant impact on the universal level are the UN Security Council resolutions, which aim to govern the cooperation with groups conducting violations. As an example, it is possible to mention the measures on arms embargo against all non-governmental entities and individuals operating in the Democratic Republic of the Congo from 2008 including measures on arms, transport, finance and travel. On the mentioned basis, if a company infringes the embargo and cooperates with human rights violators, it can be held liable for the violation of a UNSC resolution having binding nature.[317]

Furthermore, in the context of universal attempts for providing some kind of basis for corporate accountability mechanisms in certain fields it is necessary to mention the OECD Due Diligence Guidance.[318] The document encourages companies and business enterprises to build partnerships with international organisations as well as to integrate the Model Supply Chain Policy in its Annex II.[319] The policy places the topic of grave human rights violations at the top of its list, as it requires suspension or cessation of trade activities with groups associated with them. The companies are therefore obliged not to cooperate with suspicious paramilitary groups as well as public military or private security forces.[320]

The reality is that legal entities, such as major corporations often exercise power and influence, and thus are braver to violate human rights for economic reasons. In certain cases, there influence may be even greater than respectable states. Nevertheless, the enforcement of sanctions for these human rights violations lags far behind. The legal gaps, or so the uncertainty in the legal framework causes obstacles for the victims to bring claims for justice. Furthermore, if the violations occur in third world countries, victims have either no knowledge of a possible demand for justice or lack financial resources lodging an application. There are several limitations in the regional frameworks presented above.

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[317] UNSC Resolution 1857 on renewal of measures on arms embargo against all non-governmental entities and individuals operating in the Democratic Republic of the Congo, No. S/RES/1857, 22 December 2008.; UNSC Resolution 1952 on extension of measures on arms, transport, financial and travel against the Democratic Republic of the Congo imposed by Resolution 1807 (2008) and expansion of the mandate of the Committee established pursuant to resolution 1533 (2004), No. S/RES/1952, 29 November 2010.

[318] OECD Due Diligence Guidance for Responsible Supply Chain of Minerals from Conflict-Affected and High-Rick Areas, 17 July 2012.

[319] Model Supply Chain Policy for a Responsible Global Supply Chain of Minerals from Conflict-Affected and High-Rick Areas, Annex II to the OECD Due Diligence Guidance; See Hassanová, R.L. *Zodpovednosť medzinárodných organizácií s ohľadom na Návrh článkov Komisie pre medzinárodné právo*, Bulletin Slovenskej advokácie, Vol. 26/7-8, 2020.

[320] Footer, M.E. Human Rights Due Diligence and the Responsible Supply of Minerals from Conflict-affected Areas: Towards a Normative Framework? Černič J. L. Van Ho, T.: *Human Rights and Business: Direct Corporate Accountability for Human Rights*, 2015, p. 207.

The treatment of the parent company and its branch as a separate legal entity presents a limited scope for accountability of a multinational corporate, thus potentially undermining the possibility of reaching some kind of sanction or claim for compensation for abuses it has committed. Nonetheless, the reality is, that the proper application of the sanction mechanisms for these violations may have an impact on the investments in the country. The country hence may feel the pressure to reduce regulation or enforcement in these matters in an attempt to attract investors. The states are therefore often reluctant to regulate extraterritorial matters claiming either lack of jurisdiction or institutional capacity.[321]

Prohibition of torture imposes a procedural obligation to states of each human rights system to conduct a proper investigation where an individual raises a claim of ill-treatment. The obligation applies even in difficult conditions, when the states faces extraordinary circumstances and the investigation may be demanding. The investigation of acts happening extraterritorially are definitely one of these situations. As some case-law proved, these obligations did not cease to apply following justifications by a unilateral declaration and payment of compensation by the state[322] and positively do not cease by the ignorance of authorities either.

Bearing in mind the strong position of several multinational corporations as well as the obstacles and limits of the international human rights framework, there may be different legal foundations to properly sanction violations of human rights, like links to illicit treatments. Naturally, the first step in achieving justice is the action in the hands of national authorities, which duly fulfill their direct or indirect obligation stemming from international law. The obligation demands an official investigation that is capable of leading to the identification and punishment of the perpetrators. The investigation may be launched *ex officio*, when the complaint is absent from the victims or there is no *actio popularis* demand.[323] It is sufficient that there are clear indications that the prohibition of torture was violated. Hence States, in challenging situations (when victims and witnesses had primarily no possibility to claim) still have the duty to provide justice and sanction their entities.[324] The obligations on states to hold corporations responsible arises thus from international human rights law.[325]

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[321] Langille, B. *What is International Labor Law For?,* Law and Ethics of Human Rights, Vol. 3/1, n. 3, 2009, p. 62.
[322] See ECtHR, Jeronovičs v Latvia, Application No. 44898/10, Judgment, 5 July 2016.
[323] The actio popularis motion is a possibility in the Inter-american human rights system.
[324] Harris, D.J., Boyle, M. O., Bates, E.P., Buckley, C.P. *Law of the European Convention on Human Rights*, 4. edition, 208, Oxford University Press, p. 277
[325] See Jägers, N. *Corporate Human Rights Obligations. In Search of Accountability*, Intersentia: Antwerp, 2002.

One might argue that the above-mentioned examples of development in the corporate accountability may have an influence on the human rights doctrine, but the effect of an ongoing work of the regional human rights courts (even if these entities deal with states responsibilities) may have on the contrary an impact on the works of national entities. The ECtHR, as an example, has been continuously developing and widening the scope of positive obligations of states under ECHR, hence raising the states duty to protect individuals against human rights abuses.[326] Not to mention the fact, that the widely recognized multinational corporations and their suspicious activities are regularly interesting for the public and ergo these cases have the capability of raising awareness in the matters of human rights.

Undoubtedly *ius cogens* imposes obligations *erga omnes*, ie to all.[327] These obligations do apply to legal entities likewise. It would seem strange to suggest that such individual responsibility disappears in relation to corporate entities simply because those entities actions do not fall directly under the jurisdiction of the state of their establishment. However, companies as such do have direct human rights obligations under international law, thus there has to be a proper method how to sanction those who do not obey. As demonstrated in the previous chapters, in some parts of the world there are evident developments in achieving justice for human rights violations of companies, contrarily there is also certain deterioration in some regions. However, one has to take into account that the pure existence of a perfect framework or its flawless application does not absolutely preclude from human rights violations.

In sum, international law clearly bans torture in all circumstances, and it attempts to prevent other kinds of coercive treatment as well. As noted, numerous issues exists in all of the compared mechanism. Interestingly, one could certainly conclude that the European framework seems to be moving forward contrary to the American one which seem to be receding. Overally, legal rules are not clear or comprehensive enough to prevent bad-faith manipulations. But one could say the same about many areas of law.

[326] Gronowska, B. and Kapelańska-Pregowska,J. *Transnational Corporations and Human Rights*, International Community Law Review, Vol. 23, 2021, p. 452.
[327] Cassese,A. *International Law*, 2nd edition, Oxford University Press, 2005, p. 143-145.

VII. Prohibition of Torture as a new Tool for Climate Justice?

There is a growing body of evidence that climate change is an undeniable reality. This phenomenon is closely linked with observable shifts, such as the rise in global temperatures, a situation often referred to as global warming. This increase in temperature contributes to the melting of glaciers and the subsequent rise in sea levels. Additionally, these environmental changes can lead to extreme weather events, manifesting as persistent heatwaves, severe floods, and other disruptive climates. Such transformations invariably have adverse impacts, not only on natural ecosystems but also on human populations and their livelihoods.[328] In response to these alarming trends, numerous international organizations have prioritized environmental objectives within their agendas and have begun drafting treaties to address the pressing concerns of climate change. A significant milestone in this effort was marked by the adoption of the UN Framework Convention on Climate Change in Rio de Janeiro, which came into force in 1994. Following this, the Kyoto Protocol was adopted in 1997, aimed at reducing the concentration of greenhouse gases in the atmosphere. Another pivotal moment occurred during the UN Climate Change Conference in 2015, where the widely recognized Paris Agreement was crafted. To date, the Rio de Janeiro Convention boasts 198 signatories, while the Kyoto Protocol has 192, and the Paris Agreement has been signed by 195 countries. These figures indicate a strong willingness among states to collaborate and take proactive measures in the arena of environmental protection.

However, the question arises: how does this connect to the issue of torture? Some experts argue that environmental degradation has reached a critical level, posing the risk of irreversible damage that could lead not only to the extinction of various animal species but also to the potential extinction of humanity itself. Environmental advocates contend that the looming threat of a climate catastrophe has given rise to what they term “climate anxiety” a pervasive fear concerning the safety and health of individuals and their families in the face of environmental uncertainty. [329] Consequnetly, it may lead to a thought-provoking inquiry. Can this state of mental distress, particularly when related to vulnerable groups, be interpreted as a

[328] Masson-Delmotte, V. et.al. Global warming of 1.5. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty, 2019, [Online] Available at: [https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_Low_Res.pdf] (accessed 11.10.2024).

[329] Pihkala, P. *Anxiety and the Ecological Crisis: An Analysis of Eco-Anxiety and Climate Anxiety*, Sustainability, Vol. 12/19, 2020, n. 7836.

violation of the prohibition against torture? Recently, the ECtHR has seen applications that allege violations of Art. 3, alongside claims related to other articles of the ECHR, all rooted in the fears associated with climate change.

The forthcoming chapter will delve into this emerging trend in climate litigation, examining it through the lenses of human rights and criminal law. By exploring the intersection of environmental degradation and human rights law, it aims to shed light on the implications of climate anxiety as a potential factor in legal discussions surrounding torture and the protection of individuals' mental health in the context of climate change. This exploration not only underscores the complexities of interpreting human rights in the face of global challenges but also highlights the urgent need for a comprehensive and compassionate legal framework that considers the physical and mental well-being of individuals affected by the unfolding climate crisis.

7.1. Changes in the Environmental Litigation

Numerous experts assert that developing countries are disproportionately affected by climate change compared to their developed counterparts. However, it is crucial to recognize that both developing and developed nations harbor vulnerable groups who may be especially susceptible to the adverse effects of environmental changes. Among these groups are indigenous populations, as well as children and seniors, who are identified as particularly at risk due to their social status and specific needs.[330] Academics particularly emphasize the unique situation of children, considering their ongoing physical and mental development. Environmental changes pose significant threats to the fundamental rights and freedoms of children, encompassing their right to health, the right to life, the right to education, and the right to family life. For instance, research conducted by the World Health Organization indicates that a staggering 93% of children worldwide reside in regions that face potential environmental risks, such as harmful air pollution. [331]

Traditionally, these vulnerable groups have largely gone unnoticed in both international and national legal frameworks concerning climate change. The overarching harms associated with environmental impacts have often been disregarded, as they have not

[330] Burkett, M. *Rehabilitation: A Proposal for a Climate Compensation Mechanism for Small Island States*, Santa Clara Journal of International Law,Vol. 13, 2015, p. 89.
[331] World Health Organization. Air Pollution and Child Health. Prescribing clean air. Summary. [Online], Available at: file. https://www.who.int/teams/environment-climate-change-and-health/settings-populations/children (accessed 11.10.2024).

been recognized as injuries or losses subject to legal remedies either from a human rights perspective or under international climate law.[332] Although the intersection of environmental issues and human rights has been litigated in various courts, past cases typically addressed specific situations, such as the effects of noise pollution near airports, excessive exposure to waste materials, harmful radiation, or damages caused by natural disasters. Until recently, however, the ongoing deterioration of the conditions surrounding particularly vulnerable groups had not been a focus for judicial contestation.[333]

Lately, it seems that this perspective is undergoing a notable shift. The ECtHR has begun receiving multiple applications from various individuals and groups asserting that states are infringing upon their rights by failing to comply with obligations set forth by international treaties related to environmental protection. A prominent case illustrating this trend is Verein KlimaSeniorinnen Schweiz et al. v. Switzerland, which garnered attention by ruling the application from a non-governmental organization as admissible. The Court determined that Switzerland had violated the ECHR by neglecting to fulfill its obligations under Art. 8, particularly due to the lack of domestic measures to assess the remaining carbon budget of the state. [334] On the other hand, applications such as Carême v. France were deemed inadmissible, along with the case of Duarte Agostinho and Others v. Portugal and 32 others. These developments indicate a growing recognition of the necessity to confront climate justice through legal avenues, reflecting an emerging willingness to address the rights of vulnerable groups whose plight has often been overlooked. As legal systems evolve to account for the significant impacts of climate change on human rights, it becomes increasingly essential to empower these groups, ensuring that their voices are heard and their rights protected comprehensively.[335]

The shift in judicial approach indicates a wider acknowledgment of the interconnectedness between environmental health and human rights, thereby reinforcing the notion that combating climate change is not only an ecological imperative but also a critical aspect of upholding the dignity and rights of all individuals, particularly those most susceptible to its effects. As the landscape of climate litigation continues to develop, the legal

[332] Nordlander, L. Human rights law as a gap-filler: The invisibility of climate vulnerability in international climate change law. In Lupin,D.: *A Research Agenda for Human Rights and the Environment*, Edward Elgar Publishing, 2023, p. 160.
[333] See ECtHR, Öneryıldız v. Turkey, L.C.B. v. the United Kingdom, Application No. 48939/99, Judgment, 30 November 2004; ECtHR, Murillo Saldias and Others v. Spain, Application No. 76973/01, Decision, 28 November 2006; ECtHR, Viviani and Others v. Italy, Application No. 9713/13, Decision 16 April 2015.
[334] See ECtHR, Verein KlimaSeniorinnen Schweiz et al. v. Switzerland, Application No. 53600/20, Judgment, 9 April 2024.
[335] See ECtHR, Carême v. France. Application No. 7189/21, Judgment, 9 April 2024.

implications surrounding these cases will likely set important precedents, paving the way for a more inclusive and justice-oriented dialogue on environmental protections and human rights in the future. [336]

7.2. Environmental harm as a violation of Art. 3 of the ECHR?

In September 2020, six young Portuguese citizens took a significant legal step by filing a claim with the ECtHR against their own country, along with 32 other states, asserting violations of several articles of the ECHR. The application, led by Duarte Agostinho, contended that these countries had breached Art. 2, 8, 14, and 3 of the ECHR. The applicants argued that the severe and prospective impacts of climate change, which manifested as heatwaves, wildfires, and the resultant smoke from these events, posed considerable threats to their well-being, mental health, and the living conditions of their homes.[337] The plaintiffs alleged that the defendant nations failed to implement sufficiently ambitious climate actions, thereby infringing upon the commitments outlined in the Paris Agreement. They pointed out that the states had not adequately regulated and limited their greenhouse gas emissions in alignment with the goal of keeping global temperature increases below 1.5°C. The youth applicants emphasized that the annual forest fires that have plagued Portugal since 2017 are direct consequences of global warming, illustrating a clear linkage between climate change and their personal experiences of distress.

The plaintiffs filed this legal action as they believed they were victims of inaction by multiple governments, a situation that impacts them more severely due to their status as vulnerable individuals. The group, which included children aged between 8 and 21, highlighted a range of health issues associated with climate change, such as sleep disorders, allergies, and breathing difficulties. They asserted that the recurrent forest fires prevent them from engaging in outdoor activities and playing, significantly affecting their quality of life. The disruptions have also hindered their education, as schools were frequently closed due to the extraordinary circumstances linked to environmental crises. Moreover, some applicants expressed concern that climate change has caused stronger storms during winter months, which pose risks to their homes, specifically those situated close to the sea in Lisbon. The overarching objective of their application was to attain a ruling from a regional human rights

[336] ECtHR, Duarte Agostinho and others v. Portugal and 32 others, Application No. 39371/20, Judgment, 9 April 2024.
[337] ECtHR, Duarte Agostinho and others v. Portugal and 32 others, Application No. 39371/20, Complaint, 9 February 2020.

body that could lead to unified action across various national courts. By securing a common legal decision, the youth aimed to avert inconsistencies in states' emissions reduction targets and establish a more coordinated approach to addressing climate-related human rights issues. This case could set a precedent in climate litigation, empowering future generations to seek accountability from their governments for inaction on climate change. The strategic involvement of young people in legal proceedings underscores the urgent need for powerful environmental protections and human rights safeguards. By utilizing the European human rights framework, the applicants hope to bring significant attention to climate issues, ultimately fostering a more comprehensive understanding of the profound relationship between environmental health and human rights. Their claims reflect a burgeoning awareness that inaction on climate change not only endangers ecosystems but also poses serious risks to the fundamental rights of individuals, particularly those from vulnerable demographics. The outcomes of this case could pave the way for enhanced legal recognition of environmental rights as human rights, marking a crucial step in the global struggle against climate change. [338]

The Court has initially connected Art. 3 with the establishment of its jurisdiction, mentioning several prior cases that relate to the non-refoulement principle in conjunction with Article 3. An example is the case of H.F. and others v. France, which involved the repatriation of Kurdish applicants to Syria. However, while the Court had encouraged the parties to explore the potential infringement of rights protected under Art. 3 in 2020, it ultimately refrained from ruling on or interpreting the interaction between Art. 3 and climate change, as the application was deemed inadmissible due to a lack of exhaustion of domestic remedies.

Although the Duarte case did not delve deeply into the interplay between environmental degradation and the prohibition of torture, it raises important questions and potentially serves as an intriguing basis for future legal applications. The applicants in this instance expressed anxiety stemming from the recurring natural disasters they faced, particularly forest fires that have resulted in loss of life. Their fear is compounded by the ongoing rise in global temperatures, which threatens their livelihoods, health, and even the futures of their families. It is evident that climate change is impacting their lives more acutely than it did for previous generations, particularly given the ongoing environmental deterioration. While all individuals experience the repercussions of climate change, certain groups are disproportionately affected, illustrating a heightened vulnerability. Among these groups are children, such as those involved in the Duarte case, who may confront the fear of

[338] Rodrígez-Garavito, C. *Litigating the Climate Emergency. How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action*, Cambridge Univesity Press, 2023, p. 31.

direct or indirect harm with a severity that can lead to significant psychological trauma. The anxiety surrounding potential harm to their health, the possibility of losing their homes, or the threat to their livelihoods and access to essential resources creates a profound sense of distress. These emotional and psychological experiences can heavily influence the well-being of these vulnerable groups, potentially breaching fundamental human rights. The recognition of the psychological effects of climate change on specific demographics, particularly children, underscores the pressing need for comprehensive legal protections that encompass both environmental and human rights considerations. As the effects of climate change continue to manifest, it is essential for legal systems and international bodies to adapt, ensuring that the vulnerabilities of these groups are acknowledged and addressed adequately. This will not only enhance the effectiveness of protective measures against environmental harm but also reinforce the commitment to uphold and safeguard the fundamental rights of all individuals in the face of the climate crisis. By drawing connections between environmental issues and human rights, there is an opportunity to forge a more integrated approach to these critical challenges, advancing the overarching goal of ensuring dignity and safety for future generations. [339]

Various strategies have emerged to combat climate change effectively, with many advocacy groups opting to pursue human rights litigation as a viable approach. Although the rights enshrined in Art. 3, specifically the prohibition of torture, inhuman, or degrading treatment, may appear to be a significant hurdle, there is a discernible connection between human dignity and the challenges posed by climate change. Recent discussions have highlighted the phenomenon of climate anxiety, suggesting that when individuals experience sustained and intense feelings of anxiety related to environmental issues, this state of mind could adversely affect their sense of human dignity.[340]

It is essential to recognize that the environmental damage associated with climate change does not align with the definition of torture as outlined in the UNCAT. Nevertheless, insights from Nigel Rodley's reflections on the prevention of torture can be relevant when considering environmental matters as well. Rodley posits that torture is a crime of opportunity, akin to many other offenses, suggesting that those in positions of authority can exploit their power to inflict harm. The people in such positions may create conditions that

[339] The Intergovernmental Panel on Climate Change, Climate Change 2014: Impacts, Adaptation, andVulnerability, Part A: Global and Sectoral Aspects, Cambridge University Press, 2014, pp. 796-819. [Online] Available at: https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-Chap13_FINAL.pdf (accessed 12.10.2025).
[340] Clayton, S. *Climate anxiety: Psychological response to climate change*, Journal of Anxiety disorders, Vol. 74, p. 102263.

"incentivize," "authorize," "legitimize," "facilitate," or "create a permissive environment" for violations of rights. This notion encompasses both an awareness of possible wrongdoings and the distinction between action and inaction. [341] Applying this framework to environmental cases, we can see that states are aware of their obligations as laid out in various binding climate change treaties, indicating a clear understanding of their responsibilities. However, despite this knowledge, many countries remain inactive regarding significant climate action, thereby failing to fulfill their duties. The incongruity between acknowledgment and inaction raises pressing concerns about accountability.

While it may seem challenging to draw parallels between traditional crimes such as imprisonment, sexual violence, or torture and the harm inflicted by environmental degradation, there exists a credible argument that environmental damage can be viewed as part of a broader spectrum of practices targeting vulnerable populations. This includes individuals experiencing environmental devastation or deprivation, which can lead to severe physical and psychological repercussions.

Thus, recognizing the relationship between environmental harm and human rights violations is crucial. It provides a pathway for addressing climate change through a lens that prioritizes the protection of human dignity. By framing environmental degradation as an issue that can fundamentally violate rights, advocacy efforts can become more powerful. This line of reasoning encourages legal systems to consider the profound impacts of climate change not only on ecosystems but also on the health, safety, and dignity of individuals, particularly those in vulnerable situations. Through this perspective, the fight against climate change intersects with the ongoing struggle for human rights, reinforcing the need to ensure that all individuals, regardless of their status, have the right to live in a safe and healthy environment. By addressing these intertwined issues, we can advance the discourse surrounding climate action and human rights, fostering a more inclusive and effective approach to combatting the challenges posed by climate change.

Ultimately, the most viable approach to addressing environmental issues within the framework of the prohibition of torture appears to be through the lens of Art. 3 of the ECHR, which encompasses inhuman or degrading treatment. Within this context, a pivotal question arises: does the act or omission in question meet the requisite minimum level of severity? Jurisprudence from the ECtHR indicates that the Court must conduct a qualitative and

[341] Celermajer, D. *The Prevention of Torture. An Ecological Approach*, Cambridge University Press, 2019, p. 121.

context-sensitive evaluation to determine if this severity threshold has been met. [342] This assessment involves examining the treatment in terms of various factors, including its duration, nature, and the psychological and mental impacts on the victim, as well as their individual circumstances. The Court recognizes the inherent vulnerability of the victim, acknowledging that those in more susceptible positions may endure greater adverse effects from such treatment. Vulnerability can stem from several characteristics, including sex, age, health status, or the specific nature of the relationship between the perpetrator and the victim.[343] In the landmark case of Pretty v. the United Kingdom from 2002, the Court defined degrading treatment as actions that humiliate or demean an individual, undermining their sense of human dignity and eliciting feelings of fear, anguish, or inferiority capable of eroding their moral and physical resilience. While it might be assumed that such extreme mental states are uncommon, the growing uncertainties around environmental issues and the future of our planet increasingly contribute to these feelings and experiences. [344]

The ECtHR carefully considers the gravity of what an individual has endured in these challenging situations. If prolonged uncertainty is coupled with intense distress, it can lead to serious mental suffering that encompasses feelings of inferiority and despair. This persistent sense of helplessness can result in trauma. Therefore, the interplay between the vulnerable positions of certain groups and the anxiety fueled by the absence of foreseeable improvements can potentially reach the severity threshold established in Art. 3.[345] As highlighted by Mavronicola in her research, the sense of powerlessness experienced in the Duarte case is particularly poignant; it underscores the notion that even collective and strong actions by communities to foster a healthier environment may prove insufficient to avert the decline in climate conditions. Effective measures necessitate comprehensive regulations at global, national, and corporate levels to successfully mitigate or constrain the impacts of climate change. [346]

By framing the conversation around environmental matters within the context of human rights, particularly the prohibition of torture and inhumane treatment, advocates and legal scholars can continue to elevate the discussion regarding the urgent need for action. The intersection of climate change and human rights provides a platform to address the profound

[342] Mavrincola, N. *Torture, Inhumanity and Degradation under Article 3 of the ECHR. Absolute Rights and Absolute Wrongs*, Hart Publishing, 2021, p. 93-105.
[343] E.g. A son may be of a more vulnerable position to her father, irrespective of their psychical appereance.
[344] ECtHR, Pretty v United Kingdom, Application No. 2346/02, Judgment, 29 April 2002, para 52.
[345] ECtHR, Clasens v Belgium, Application N. 26564/16, Judgment, 28. May 2019, Para 36.
[346] Mavronicola, N. *The Future is a Foreign Country: State (In)Action on Climate Change and the Right against Torture and Ill-Treatment*, European of Rights and Liberties, Vol. 2022/2, n. 6, 2022, p. 219.

psychological and emotional toll that environmental degradation exerts on individuals, especially vulnerable populations. As this dialogue evolves, it is crucial to recognize that safeguarding both the environment and human dignity are intrinsically linked goals, and collaborative efforts must be harnessed to prevent further harm and protect the rights of all individuals in the face of an escalating climate crisis.

The concept of losing hope serves as a significant connecting thread between various notions of harm and suffering, particularly within the scope of human rights law. In the case of Vinter, the ECtHR articulated that the loss of hope can be understood as having detrimental effects on individuals. To strip away hope is to negate a fundamental aspect of our humanity. [347] While the Court's doctrine has primarily focused on the loss of hope in cases involving life sentences without the possibility of parole, it is crucial to recognize that victims of climate change also endure this loss. This sentiment is particularly poignant for children, who are acutely aware of the environmental changes affecting their world. Extreme weather events, such as rising sea levels, droughts, and natural disasters, contribute to a pervasive atmosphere of despair. Some experts even argue that these changes threaten the very existence of humanity. As discussions about climate change continue and alarming news becomes a regular part of life, the experience of "losing hope" has sadly permeated the everyday lives of many in the current generation.

Moreover, in the Budina case, the Court highlighted that there are circumstances in which a state can be held accountable when an applicant finds themselves in severe deprivation that is incompatible with human dignity, especially when such circumstances are reliant on state support. The case revolved around an asylum seeker who was held in degrading conditions, illustrating the state's obligation to act when environmental situations lead to serious deprivation. This responsibility is underscored in the context of natural disasters, such as wildfires, droughts, or floods. In conclusion, after thorough examination, it becomes apparent that numerous elements fulfill the criteria established in Art. 3 of the ECHR. The safeguarding of human dignity is at the forefront, as it can be compromised when an individual lives in constant fear of the consequences of climate change. Furthermore, the understanding that states are aware of the environmental crises, which were highlighted during the drafting and signing of various international environmental treaties, adds another

[347] ECtHR, Vinter v United Kingdom, Applications No. 66069/09, 13/10 and 3896/10, Judgment, 9 July 2013, para. 1.

dimension to this discussion. The failure to fulfill positive obligations arising from these treaties creates a duty for states to take meaningful action.[348]

Nonetheless, the threshold of severity must be assessed on a case-by-case basis, ensuring that each situation is given appropriate consideration. The pressing question arises as to whether the concept of human dignity, as enshrined and protected in Art. 3, should be interpreted in relation to environmental issues. The original intent of the ECHR drafters, when enshrining the intentionally vague prohibition of torture, may have been quite distinct from this line of interpretation. While the evolving case law of the ECtHR has indeed broadened the traditional understanding of the prohibition of torture, there is concern that introducing climate change as a factor may complicate or dilute its significance. Some may contend that this approach risks undermining the prohibition itself and could detract from the substantive nature of environmental litigation.

As we navigate these complex intersections of human rights and environmental challenges, it is imperative to ensure that the principles of dignity and protection are upheld without conflating distinct legal frameworks. Moving forward, it will be essential for legal scholars, practitioners, and policymakers to critically engage with these issues, ensuring that the fight against climate change does not inadvertently compromise the powerful protection established to guard against torture and inhumane treatment. It is this careful balance that will define the future of human rights law in the context of an ever-changing environmental landscape.

7.3. Concluding remarks on climate justice

The relationship between climate change and the prohibition of torture presents a complex and compelling narrative about how environmental issues intersect with human rights. As climate change continues to intensify, manifesting in severe weather phenomena such as rising sea levels and increased frequency of natural disasters, it is vital to consider how these changes adversely affect vulnerable populations. This includes groups such as children, seniors, and indigenous communities, who often bear the brunt of environmental degradation.

Human rights law offers significant avenues for addressing these emerging challenges. Central to this discussion is the ECHR, which serves as a poweful legal framework for protecting individuals from torture and ill-treatment. Recent conversations have raised

[348] See ECtHR, Budina v Russia, Application No. 45603/05, Decision, 18 June 2009.

awareness of "climate anxiety," a term that captures the pervasive fear and distress experienced by individuals as they confront the realities of climate change. This anxiety, particularly when affecting vulnerable populations, has prompted questions about the impact on human dignity, making it a relevant consideration within the scope of human rights protections.

Several important cases have highlighted this new territory within climate litigation. The claims filed by young people, such as in the case of Duarte Agostinho and others, reveal a growing recognition that inaction on climate change can lead to significant violations of basic rights. These cases illustrate how fear and mental distress stemming from environmental threats can be framed as infringements of the prohibitions against torture and inhumane treatment outlined in the ECHR. This legal approach opens the door to argue that governments have responsibilities to mitigate the impacts of climate change, particularly as they relate to the mental health and overall well-being of their citizens. The acknowledgment that climate change can hinder the enjoyment of fundamental human rights marks an important shift in how legal systems address environmental issues. Certain groups, particularly those who are more vulnerable, face unique challenges that call for a reevaluation of protections granted under human rights law. As climate litigation evolves, utilizing the prohibition of torture as a platform for advocating environmental justice presents a promising avenue for effecting change.

In summary, the prohibition of torture may serve as a possible instrument in the broader movement for climate justice. By integrating environmental degradation into the framework of human rights, we can reinforce the principles of dignity and mental health for all individuals affected by climate change. As legal scholars, practitioners, and activists work through these interconnected issues, it is essential to cultivate a comprehensive legal framework that not only strives to protect the environment but also prioritizes human dignity. The goal is to create a world where every individual can thrive in a healthy environment, thereby fulfilling the fundamental human rights we all deserve. By confronting these challenges collectively, we can pave the way for a future where justice is not just an aspiration but a tangible reality for all, ensuring that human rights and environmental concerns are addressed in tandem in the face of an accelerating climate crisis.

VIII. War on Terror

The world has experienced in the 21st century the emergence of a new transnational crime. Even though the act of terrorism is not a recent problem the possibility of threats have definitely gained international interest. The current rise of the political evil from different regions of the world has impacted the mindset of everyone. Terrorism has become a rampant issue in the contemporary world. It represents a real threat and an evident violation of human rights.

The increasing levels of economic and technological development has brought with themselves globalization. Globalization as such may be seen for some as something positive, for some as something antipathetic. It has undoubtedly brought civilizational achievements thorough the countries bringing better medical support or education. Nonetheless, it brought also numerous foreign values and trends which can affect adversely the cultural heritage rooted in the region. Despite different positive features of the globalization it has opened up new possibilities also for criminals. Humankind has thus experienced widespread global injustice and unspeakable acts of political evil.[349]

The most-known terrorist attacks from September 11 in 2001 in the United States shock the world. One of the most powerful countries could not protect itself from external threat. People around the world have started to feel afraid. The modern societies hence felt the need to react on national as well as on international level. All states and international organizations agreed on the condemnation of the odious and loathsome phenomenon. It became necessary to create and implement measures. First, there was a need to establish the content of the new crime. What are the elements necessary to fulfill in order to establish the responsibility and criminality of the act? Secondly, the establishment of a new criminal act enabled states to create additional specific procedural rules. In numerous states the rise of a new global security policy has brought with itself notable legislative changes. The goal of the measures against terrorism is to prevent such acts, defeat terrorists and to generally eliminate its occurence.

A global military campaign called as war on terror, initiated by the United States after the mentioned terrorist attack started various armed conflicts. The main military targets were the military Islamist radical groups. The initial conflict was directed towards groups residing in Afghanistan, Pakistan or Iraq. Nevertheless, the primary enemy groups, several other

[349] O'Sullovan, J. An Open and Shut case. Economist, 2016, [Online], Available at: https://www.economist.com/special-report/2016/09/29/an-open-and-shut-case (accessed 10.3.2025).

global operations started in different regions, such as the intervention of the U.S. army in Somalia. The war on terror, that has since developed, has directly and remarkably affected the already established institutions of law, mainly human rights and its international framework. Governments have taken measures in the name of war on terror, that on one side ensure the protection of some human rights and on the other also threaten the human rights framework. There are certainly two viewpoints, how to understands the two seemingly opposing perspectives. One understands terror as such an imminent threat, which cannot be dealt with in the traditional framework of constitutional democracy, hence it demands an extraordinary legal order where the purpose justifies the method. The other viewpoint is fighting for the opposite where human rights prevail in every circumstance.[350] The first understanding is the one which fundamentally reformulates and scars the international human rights protection established by the international society so diligently before. According to Szikinger, it is not an exaggeration to claim that yet the traditional viewpoint wants to keep war against terror inside the legal framework, the new more extreme viewpoint is pushing the boundaries in a way to come outside the law. Those who promote the extraordinary character of the war against terror lead up to the denial of fundamental legal and ethical values even though their initial goal is to protect the remnants of these values.[351]

The following chapter will be dealing with this understanding of exceptional circumstances. The war on terrorism although trying to safeguard the right to life, resulted in unacceptable consequences in various forms. The human rights framework has been deeply scarred when some countries (mainly the U.S) released the ghost from the bottle after the 2001 attacks. The injury on international human rights, was done primarily due to methods violating the prohibition of torture. Thus, it is imminent to critically observe the phenomena of war on terror when considering prohibition of torture.

8.1. New type of terrorism

The analysis at hand is not primarily devoted to the notion of terrorism but rather putting emphasis on the range of responses to it and its compliance with the human rights framework. Nevertheless, it is necessary to take into consideration the nature of the phenomenon in order to fully comprehend the character of the prohibition of torture nowadays. As terrorist attacks from 2001 changed the perspective of the fight against

[350] Kőhalmi, L. *Terrorism and human rights*, Journal of Estern-European Criminal Law, 2016, no. 1, p. 159.
[351] Szikinger, I. *Terrorizmus es jogkorlátozás*, Fundamentum, 2005, Vol. 3, p. 48.

transnational criminal activity, the human rights platform was strongly influenced. Several distinctive interpretation of the scope of rights of states arose, heavily harming the previous understanding of either the human rights system as well as what constitutes the rule of law. Hence, it is imminent to describe what this "new" terrorism means.

The terror comes from the latin term meaning fright, horror or fear. The exact definitions of terrorism are non-existent, thus every country, every international treaty or even scholar has its own method how to define the acts. Fletcher states, that it is not possible to determine the exact definition of terrorism, and only the existence of the predetermined circumstances and requirements create the phenomena itself.[352] Ben Saul claims that, there is no real difference between terrorism and internal political violence. The definition is clearly complex and difficult. The definition of the notion varies or is missing in treaty law. Terrorism as such was not defined in the Convention for the Suppression of Terrorist Bombings, the Convention on the Financing of International Terrorism or the Convention on the Suppression of Acts of Nuclear Terrorism. The common "non-definition" is rooted in the lack of consensus between countries infused with the problem of national liberation movements and how to legally suppress them without fulfilling the possible definition of terrorism.[353]

Nevertheless, although there is no common definition, all states in their national legislation, as well as the general understanding, contain certain predefined notions as part of their own definition. The core aspect is represented by the illegal violence. This illegal violence has an aim besides causing harm or threat to life. Consequently, it is understood as the application or threat of open violence with the aim to cause fear in the public. Already the UNGA in 1994 Declaration on Measures to Eliminate International Terrorism stated, that terrorist acts are intentional criminal acts with the aim to provoke a state of terror in the public, group of persons or particular persons. In addition, these actions are generally politically motivated and cannot be justifiable by any reasons.[354] The immediate victims of the acts do not have a relationship with the perpetrator, they are mostly in a symbolic relationship with the action and their selection to be victims is usually random.

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[352] Fletcher, G.P. *The Indefinable Concept of Terrorism*, Journal of International Criminal Justice, 2006, Vol. 4/5, p. 894.
[353] Bantekas, I. and Oette, L. *International Human Rights. Law and Practice*, 3 edition, Cambridge University Press, 2020, p. 787-8; See Un report of the High-level Panel of threats, challenges and change. UN doc. A/59/565, See UN Special Tribunal for Lebanonm Interlocutory Decision on the Applicable Law: Terrorism, Conspiray, Homicide Perpetration, Cumulative Charging, No. STL-11-01/I, 16 February 2011.
[354] UNGA resolution No. 49/60, 9 December 1994.

The history of terrorism has undoubtedly entered into a new era since the mentioned terrorist attacks. The public has generally started to feel less safe and security questions became top priority in political discussions. Not to mentioned that numerous databases, such as the one which is provided by the National Memorial Institute for the Prevention of Terrorism, claim that the number of terrorist activities including the damage that they cause has increased since then. The information gathered from Middle East, South Asia and even in some post-Soviet Asian countries prove, that the tendency of causing harm through terrorism was probably "inspired" by the attacks in 2001.[355] However, as Tálas claims, the statistical data can't provide the real image of a terrorist threat as majority of terrorist groups operate on local and national level and are incapable or yet incapable of presenting any terrorist activity.[356]

Generally, researchers have observed, that the causes of spread are rooted in several factors. While the lack of proper governance in the region where these groups occur is the core, the absence of human rights, rule of law or political exclusion are strongly influential elements. On the other hand, the foreign policy of the target country has also an impact on the execution of crime. The mentioned factors have thus strong relationship to the globalization mentioned at the start of the chapter. With the spread of the new achievements those "forgotten" regions are missing opportunities as well as good life conditions. For this reason, it is imperative to develop a global strategy to fight terrorism which can be applied in the affected regions.[357]

The reaction after 2001 were seen on the normative basis globally. The United Nations Security Council had passed numerous anti-terrorism resolutions, that enhance legal obligations upon Member countries to amend their national legislation or to create new more effective legislation, including its implementation in order to fight against terrorism comprehensively. One of the most significant, from the many resolutions is n. 1373,[358] which requires commitments of prevention of financing terrorism, criminalization of these acts, besides promotion of international cooperation in the matter. More than 170 countries, along

[355] See Ellis. J. O. *MIPT: Sharing Terrorism Information Resources. Conference Paper. Lecture Notes in Computer Scienc*e, conference paper of the Intelligence and Security Information, 2004, pp. 520-525.
[356] Tálas, P. Póti, L. Takács, J. *A terrorizmus ellenik kuzdelem fogalmi és tartalmi keretei, különös tekintettel annak a katonai dimeziójára,* ZMNE Stratégiai Védelmi Kutatókozpont Elemnzések, Vol. 2004/3, p. 2.
[357] See UNSC Resolution No. 1624, 14 September 2005; UN Secretary- General report, Uniting against Terorrism: Recommendations for a Global Counter-Terrorism Strategy, UN doc. A/60/825, 27 April 2006.
[358] See UNSC Resolution No. 1373 on threats to international peace and security caused by terrorist acts, 28 September 2001.

with new legislation, also freezed assets of possible terrorists.[359] The process of new amendments regularly included the broadening of powers of executive bodies, including collecting information or surveillance. Additionally, this caused detention of persons allegedly involved in terrorism without sufficient legal grounds, freezing of funds without significant evidence as well as the adoption of extraordinary coercive interrogations.[360]

The strengthening of executive powers were in numerous states implemented as an extraordinary and temporary measure. Still, the concerns in relation to the impact towards human rights and rule of law were evident. The principal question how to reconcile the security interests and human rights, has been an on-going topic of discourse between politicians and experts. American political leaders claimed, that it is imminent, that those mechanisms which protect individuals from excessive state power would not stop the state's capability to respond adequately to an external threat. They were claiming, that human rights and fundamental freedoms were generally created for the time of peace and the framework does not apply to extraordinary situations as emergency caused by foreign danger.[361] Nonetheless, what is the situation with those human rights which are generally accepted as *ius cogens*, from which no derogation is allowed in any situation?

Certainly, new forms of terrorism are represented also via the virtual sphere, where cyberterrorism occurred. This type of crime poses remarkable challenges in the modern society. As appropriate measures are extremely difficult to draft and implement, it is unlikely that threats of cyberterrorism will be soon addressed. The lack of a universally accepted definition is likewise an obstacle when dealing with cyberterrorism. Nonetheless, some aspects have to be the same. The damage or threat of damage caused either to health or to property and the fear which it causes. The distinction from conventional terrorism is the use of computer networks. Both of the forms are able to disrupt, destabilize the infrastructure of a country with wider psychological effects. Even though this form of terrorism can have tremendous impacts on the population and the human rights protection it is doubtful that it can cause the violation of the prohibition of torture. Thus, besides claiming that the topic of cyberterrorism is noteworthy, the author deems it as unnecessary to further consider.[362]

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[359] Hickman, D. *Terrorism as a Violation of the Law of Nations: Finally Overcoming the Definitional Problem,* Wisconsin International Law Journal, Issue 29, 2012, p. 447.

[360] Shaglah. A.A. *Security Council Response to Human Rights Violation in Term of Combating Terrorism: Retrospect and Prospect*, Beijing Law Review, Vol. 7/ 2, 2016, p. 115.

[361] Posner, R.A. Security Versus Civil Liberties, The Atlantic Monthly, 2011, [Online], Available at: https://www.theatlantic.com/magazine/archive/2001/12/security-versus-civil-liberties/302363/ (accessed 7.1.2025)

[362] Shiryaev, Y. *Cyberterrorism in the Context of Contemporary International Law*, San Diego International Law Journal, Vol. 14./1, 2012, p 146-7. See Lewis, J.A. *The Internet and Terrorism*, American Society of

The reaction to the emergence of a more significant and new terrorist efforts was the already mentioned creation of the war on terror by the U.S. administration. Consequently, the question arises whether we may be talking about the crime of terrorism during an armed conflict. According to the Special Tribunal for Lebanon, the crime of terrorism is currently a peace-time crime and it is necessary to outlaw terrorist acts during conflicts as well.[363] Nevertheless, the U.S. government acted after the shocking terrorist attack as if it started a war against a new kind of enemy. As the subjectivity of a terrorist group is legally non-existent, the U.S. military operations instructed by the government interpreted the international humanitarian law subjectively. As international humanitarian law is understood as *lex specialis* during an armed conflict the treatment of enemy combatants would not be basically under the framework of the international human rights law.[364] The new terrorism created new interpretation of legality, failing to remember the *raison d'étre* of international human rights protection.

8.2. European perspective on torture and terrorism

Governments in Europe have drafted and implemented new legislative measures to address the growing threat of terrorism appropriately. The new regulations were various, including travel bans, entry bans, expulsion orders, controls, area restrictions as well as citizenship revocation. These we know under the name administrative measure created for counter-terrorism. The increasing tendency of using these measures were raising doubts in scholarly debates. Numerous arguments were opposing their regular usage and demanding limits in relation to their scope of application and methods. As the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe declared, those measures to combat terrorism which infringe the human rights are counter-productive and it is necessary to ensure thorough conformity with the human rights obligations.[365]

International Law, Vol. 99, 2005; Flemming, P. and Stohl, M. Myths and Realities od Cyberterrorism. In Schmid, E.P.: *Countering Terrorim Through International* Cooperation, Proceedings of the International Conference, 2001.

[363] UN Special Tribunal for Lebanon, Interlocutory Decision on the Applicable Law: Terrorism, Conspiray, Homicide Perpetration, Cumulative Charging, No. STL-11-01/I, 16 February 2011, Para 107-109.

[364] Iniative of the International Commission of Jurists, Assessing Damange, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, 2009, p. 51.

[365] Decision No. 1063 OSCE Consolidated Framework for the Fight against Terrorism, No. PC.DEC/1063, 7 December 2012.

The commitment to some fundamental human rights does not stop in times of crises, which could be caused by a threat or occurrence of terrorism. Although the terrorism may cause extraordinary situations, these do not lead to the total abandonment of the defining principles of humanity itself. In times of crisis it is particularly necessary to adhere to the core of the human rights framework. Besides, the use of the extreme limitations of human rights would mean putting oneself on the same moral plane as the terrorists for whom the end justified the means.[366] Hence, there are some rights, which allow no derogation in any extraordinary situation.[367]

The ICCPR contains in its Art. 4 and the ECHR in its 15 a derogation clause which enables the member states of the treaty to legally suspend their obligations stemming from the conventions during times of war or other public emergency. In order for the derogation to be legal, it has to fulfill certain requirements, such as information obligation, official proclamation, no involvement of discrimination or that the measures violate other international obligations. Both of the examples of derogation clauses however include limits to this derogation. In the case of the ECHR we may observe Art. 2, 3, 4 (paragraph 1) and 7. These are the right to life (except in respect of deaths resulting from lawful acts of war), the prohibition of torture and other forms of ill-treatment, the prohibition of slavery or servitude, and no punishment without law. In the first case of the right to life, it had been already observed by the jurisprudence of the ECtHR, that it does not have an absolute nature, and there are several exceptions stemming from provisions of Art. 2. Regarding the rest of the non-derogatory rights it is quite obvious that these represent fundamental values of the human rights protection, thus they are also considered also as customary international law.[368]

Prohibition of torture is understood as fundamental value of the democratic society.[369] Consequently, the human rights treaty framework explicitly stipulates the rights as non-derogatory, terminating any measures of illicit treatment for any extraordinary event.

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[366] Michaelsen, C. Permanent Legal Emergencies and the Derogation Clause in International Human Rights Treaties: A Contradiction? In Masferrer, A.: *Post 9/11 and the State of Permanent Legal Emergency. Security and Human RIghts in Countering Terrorism*, Springer, 2012, p. 288.

[367] See Hassanová, R.L. Derogation clause in the times of Corona crisis, In Bándi, Gy:. *Law in Times of Crisis. Selected doctoral studies*, Pázmány Press, Budapest, 2023.

[368] Prohibition of torture and prohibition of slavery are generally understood as *ius cogens*, however the author dares to claim that in this sense even the right of no punishment without law can be part of *ius cogens*. The author would like to emphasize that according to the VCLT and the conclusion of the Special Rapporteur the requirements of *ius cogens* are acceptance and recognition of the rights by the international community as a whole. Hence the states are the ones to accept a norm as peremtory. If we consider the principle of legality, we observe that it is part of every national framework. Additionally, the system of trust between citizen and state would be infringed without its existence; See Hassanová, R.L. Šmigová, K. *Derogačná klauzula Európskeho dohovoru o ochrane ľudských práv a základných slobôd v čase koronakrízy,* Dôsledky pandémie na formovanie medzinárodného práva, Zborník príspevkov z XIII. slovensko-českého medzinárodnoprávneho sympózia, 2022.

[369] ECtHR, Assenov and Others v. Bulgaria, Application No. 90/1997/874/106, Judgment, 28 October 1998.

Consequently, there are no limitations to the prohibition of torture even when the threat of terrorist attacks are present. Indeed, this has to be kept in mind even when police forces interrogate detainees, who have been specially trained to withstand any legal interrogation tactics.[370] In these situations, the European framework knows no justifications to commit torture or any illicit treatment of the suspect. Additionally, the protection provided by the ECHR is so wide that it ensures protection not only for persons being under the jurisdiction of the member states, but also to secure everyone's safety including relationships between private entities. Not to mention, that the ECHR Art. 3 goes beyond the protection provided in the UN Convention on the Status of Refugees, when it prohibits expulsion when substantial grounds prove a real risk of individual being subjected to torture if sent to the country of residence.[371]

In relation to Art. 3 the ECtHR has rested upon the presumption *iuris tantum*, which will apply where a person is taken into custody in good psychical health conditions, nonetheless there are evidences of injury when released. In these situations the state has the burden of proof to present to the ECtHR the circumstances of its custody. The explanations given by the authorities have to be satisfactory and convincing. It does not necessarily mean that any use of force is considered as a violation. But this use of force has to be unavoidable. E.g. measures taken to prevent from escaping a suspect.[372]

The definition analyzed in the first part of thesis was applied in full in terrorism related cases. The ECtHR took into account both the definition included in the ECHR as well as the one in Art. 1 of the UNCAT. Additionally, in numerous terrorist related ECtHR cases the Court had the possibility to define the distinction between the notions of illicit treatment, such as degrading treatment or inhuman treatment. In the case of Berktay the Turkish authorities suspected that a 17-year old university student is part of a terrorist activity. When he was arrested he was pushed off a balcony at his own house, falling four floors on concrete. The authorities afterwards prevented him to get proper medical care, as the father of the boy was not allowed to take him to hospital which could provide tomography before going to the police station. The father on the mentioned police station unwillingly signed a testament accusing the boy of being a militant, having activities against the state structure. In the present case the ECtHR declared, that even in situations when there are existing allegations of a possible anti-state activities the suspect enjoys protection. The Court in this case analyzed

[370] ECtHR, Aktas v Turkey, Application No. 24351/94, Judgment, 24 Aorul 2003, para. 310.
[371] ECtHR, Chahal v United kingdom, Application No. 22414/93, Judgment, 15 November 1996, para 80.
[372] Salinas de Frías, A. *Counter-terrorism and human rights in the case law of the European Court of Human Rights,* Council of Europe Publishing, 2012, p. 40.

whether the purpose of the measure taken, was to humiliate the person, and to put him into a specifically vulnerable position. Presently, the public aspect of treatment is an important factor. Nevertheless, it may suffice, that the victim is feeling humiliated and positioned into a hopeless situation. Thus, the case interpreted the notion of degrading treatment and its absolute prohibition in cases of a possible terrorist anti-state activity.[373]

The case of Babar Ahmad from 2012 presents a "radicalization" of the counter-terrorism activities and a cooperation of USA and Europe in fighting terrorism. The case concerned a British Muslim man, Babar Ahmad who experienced various interrogations between 2004 a 2014 by United Kingdom and US forces. In 2007 when he was facing extradition to US he applied to the ECtHR for help, claiming that the prison term served in the ADX Florence, super-max prison, would cause him irreparable mental harm and the measures in USA would subject him of being sentenced to irreducible life sentence. The ECtHR in its decision from 2012 considered the conditions of the prison cell, taking into account lack of human contact, which is connected to serving such sentence. The Court decided that based on the facts of the case, Babar Ahmad can be considered as part of a terrorist group, which can be deemed as posing a serious security issue. Considering this, the refusal of communication with inmates or the outside is justifiable. With regard the solitary confinement, the Court has already declared, that it is not considered generally as a violation of Art. 3, if not imposed as indefinitely.[374] The UN Special Rapporteur on Torture has recommended, that 15 days should be the limit of solitary confinement and prolonged solitary confinement, linking this argumentation with the evidence, that isolation taking longer may have harmful mental effects which can be even irreversible. The rapporteur had even suggested to impose a ban on prolonged solitary confinement or solitary confinement applied to juveniles or disabled persons.[375] Regarding the possible life imprisonment, the ECtHR set, that it was uncertain whether the American authorities would refuse to avail themselves of mechanisms, which would reduce the sentence.[376] The pertinent proves, that after the 9/11 terrorist attacks the tendency had changed even on European platforms. The judges of the Court were rather

[373] ECtHR, Berktay v Turkey, Application No. 22493/93, Judgment, 1 March 2001.
[374] ECtHR, Ramirez Sanchez v France, Application No. 59450/00, Judgment, 4 July 2006, para 123.
[375] Special Rapporteur on Torture Tells Third Committee Use of Prolonged Solitary Confinement on Rise, Calls for Global Ban on Practice. [online], Available at: https://press.un.org/en/2011/gashc4014.doc.htm. Accessed 13.01.2025.
[376] ECtHR, Babar Ahmad and Other v United Kingdom, Application No. 24027/07, 11949/08, 36742/08, 66911/09, 67354/09, 10 April 2012.

careful when dealing with terrorists including wide arrange of executive powers when detaining is performed by USA.[377]

In 2005 the European media was shocked when the Human Rights Watch disclosed information about harmful interrogations performed by the CIA in Poland. Al-Nashiri, a victim of these coercive interrogations, was a Saudi national connected to the al-Qaeda group and charged with the terrorist attacks against USS Cole in 2000. He is currently serving his sentence in the well-known Guantanamo Bay prison. The interrogation with the knowledge of the Polish authorities included techniques such as hooding, handcuffing, mental distress (racking handgun once or twice close to Al-Nashiri's head[378], causing fear with power drill when victim was naked, threatening family members) kneeling on the floor or bruising his body. In addition, the Al-Nashiri case involved also Romania, which as proven, also participated in rendition, secret detention and ill-treatment of the suspect. The ECtHR in 2015 ruled, that Poland and Romania has violated several articles of the ECHR, including Art. 3. In its judgment, the Court emphasized the special *ius cogens* nature of the article including its absolute non-derogatory nature. It adds, that terrorism may lead to difficult circumstances, yet these aspect do not influence the treatment of individuals related to Art. 3. Furthermore, it mentions various case-law dealing with the article, referring to minimum level of severity needed. Lastly, the Court adds that it was the Member States (Polands) obligation to ensure that individuals within its jurisdiction are not subjects to torture or any other inhuman act. As the coercive interrogation (falling under the most severe notion of torture) in a secret detention facility was proven beyond reasonable doubt Poland was held liable. Moreover, none of these acts could be justifiable in any circumstances.[379] The Al-Nashiri case besides confirming the strong standing of Council of Europe, and European Human Rights framework regard prohibition of torture, dealt with the topic of secrecy claims. The Court has overthrown the argument of national security when terrorism comes into stakes. The principle, that the whole society has to know the truth and that the executive power has to have boundaries was affirmed. Consequently, it strengthened the position of the prohibition, as otherwise

[377] See Poynting, S. *Entitled to be a radical? Counter-Terrorism and Travesty of Human Rights in the Case of Babar Ahmad*, State Crime Journal, Vol. 5/ 2, 2016.
[378] Racking is a mechanical procedure used with firearms to chamber a bullet or simulate a bullet being chambered.
[379] ECtHR, Al-Nashiri v Poland, Application no. 28761/11, 24 July 2014, para 507- 519.

practically it would be ineffective enabling governments to operate with impunity when using security as a justification.[380]

The framework of human rights protection does not make any distinction based on the political thinking or political actions of individuals. Human rights are granted irrespective of ideology or criminal past. Particularly the prohibition of torture is a safeguard purposefully intended for persons in detention, irrespective of the horrible crimes they allegedly or provable done. International standards do consider the prospect of activities which aim to undermine the democracy and safety of others. In this circumstance some human rights of the perpetrators can be and have to be limited. This possibility however does not apply to the absolute rights, such as the prohibition of any illicit treatment.[381] This was upheld in the ICJ case United States v Iran, where the Court stipulated that it is incompatible with the UN Charter as well as the Universal Declaration of Human Rights to wrongfully subject individuals to physical constrain even in conditions of hardship.[382]

8.3. American perspective on torture and terrorism

United States have been for years number one in the amount of money spent on defense.[383] These finances are however, dedicated not only for internal safety measures, but mainly for frequent military actions in foreign countries.[384] As the Department of State declares, it is central for the US foreign policy to promote peace, democracy and the protection of human rights around the world. Yet is it completely true that U.S. military's aim is only to protect human rights around the world? As Stohl and Apodaca state, even the most positive thinking advocate would not believe that the US is prioritizing human rights concerns in Middle East over the strategic interests of the country.[385] Military interventions on locations as Bosnia, Libya Somalia or Kosovo can be somewhat justified by humanitarian

[380] Carpanelli, E. *Can States Withhold Information about Alleged Human Rights Abuses on National Security Grounds: Some Remarks on the ECtHR Judgments of Al-Nashiri v Poland and Husayn (Abu-Zubaydah) v Poland*, Polish Yearbook of International Law, Vol. 35, 2015, p. 220-221.
[381] Cassese, A. *Terrorism and Human Rights*, American University Law Review, Vol. 31/4, 1982, p. 951.
[382] ICJ, U.S. Diplomatic and Consular Staff in Tehran (United States v Iran), ICJ GL No. 64, Rep. 3, Judgment, 24 May 1980, para 91.
[383] Top 10 countries with the highest military spending: Where doea India stand? [Online]. Available at: https://indianexpress.com/article/trending/top-10-listing/top-10-countries-with-the-highest-military-spending-2024-check-indias-rank-9585074/. (accesed 14.01.2025).
[384] Russia and China are most likely in the race for the position of being the first in spending for defense issue. Nonetheless Chinese are more concerned with regional hegemony (Taiwan, Korea) and Russia besides the situation in Ukraine is not using direct military power as much regularly.
[385] Apodaca, C. and Stohl, M. *United States Human Rights Policy and Foreign Assistance*, International Studies Quarterly, Vol. 43, 1999, p. 187.

intervention and the UN Responsibility to protect resolution.[386] Still, it is difficult to interpret the reasoning when and how the US military starts to use military force.[387]

Immediately after the 9/11 terrorist attacks, president Bush announced war on terror adding that either the international community is with him or against him. The American military groups first and foremost aim was the arrest of al-Qaeda group members, with its leader Osama bin Laden. Additionally, the army had the task to eliminate any possible terrorist threats. In order to achieve the goal the US military invaded countries in the Middle East. During these operations and under the "necessities of the war on terror" the US government established prisons on foreign grounds to properly investigate the suspects. The techniques used here were part of extraordinary rendition, meaning endless interrogations and frequent transfers from one prison to another.[388] Overwhelming evidence from diverse sources, such as media news outlets, reports given by the International Red Cross, human rights non-governmental organizations supported by testimonies from victims confirm these US interrogation practices at different locations (Bagram Air Base, Guantanamo Bay or Abu Ghraib) contravened the international legal prohibitions of torture and cruel, inhuman, or degrading treatment. These allegations emerged shortly after the initiation of the war on terror. A 2002 Washington Post report detailed the use of techniques at Bagram, described as stress, duress and torture lite, which involved methods such as prolonged stress positions, sleep deprivation, and sensory manipulation (hooding or bright lights). Furthermore, credible reports indicate the transfer of suspects to interrogation facilities in countries notorious for employing torture (Jordan, Egypt, Syria or Morocco). It had been confirmed by interviews with current and former government officials, that the CIA operated secret, incommunicado detention centers applying these techniques for suspected terrorists globally.[389]

The process of enhanced interrogation began with some legal justifications.[390] The first was the memorandum of attorney general Alberto Gonzales in 2002, declaring the amending of the already established international norms. It stated, that the war on terror is a

[386] UNGA Resolution on 2005 World Summit Outcome, No. A/RES/60/1, 16 September 2005.
[387] Haas, R. N. *Intervention: The Use of American Military Force in te Post-Cold War World*, Carnegie Endowment for International Peace, 1999, p. 13
[388] See Grey, S. *Ghost Plane: The Untold Story of the CIA's Torture Program*, Scribe Publishing, 2007.
[389] Getting away with Torture? Command responsibility for the U.S. Abuse of Detainees. [Online]. Available at: https://www.hrw.org/report/2005/04/24/getting-away-torture/command-responsibility-us-abuse-detainees. (accesed 14.01.2025).
[390] Besides the mentioned memo's the US has also enacted the well-known Patriot Act, which granted exceptional powers to security agencies nationally. The government had thus almost unlimited possibility to invade the privacy when national security was at stake.

new phenomenon and this it makes the limitations of the Geneva Conventions obsolete.[391] It established that the Geneva Conventions do not apply to terrorist groups, as these groups should be understood as unlawful combatants. The memorandum was supported later by secretary of defense Rumsfeld when he enabled numerous interrogation methods in Guantanamo.[392] The methods were afterwards additionally expanded when the secretary made any method legal, allowing interrogators to use any means necessary.[393] The "legality" of these actions was authorized by another memorandum of Bybee, which interpreted torture as a physical pain equal to serious physical injury such as organ failure, impairment of bodily function or even death. Furthermore, the memorandum stipulated that just the most severe form of the prohibition included in UNCAT "torture" is the one which is prohibited. In addition, those interrogators who performed these coercive interrogations would not be responsible for their acts as they were justified by necessity defense or self-defense of the state.[394]

Even though the public interest exploded just after the news regarding torture perpetrated by US. Military in Abu Ghraib, the topic of legality of coercive interrogations was part of academic discussions already before. The topic of legality and morality of the use of extraordinary techniques justified by the protection of many, is known under the notion ticking-bomb scenario. A hypothetical experiment to question the absolute prohibition of torture, when life of many is at stake. Nevertheless, several questions arise when we allow exception to the general prohibition. First, how specific has to be the possible threat? In this sense the interrogator would have to prove an imminent threat. Second, how many people has to be at risk to justify such interrogation? Are two lives more than one? Or there is a minimum threshold which would allow illicit treatment? Third, what kind of information has to be in possession of the suspect to allow these techniques? There has to be some kind of degree of certainty that the suspect has relevant and reliable information. Fourth, will the coercive interrogation be effective and prevent in time the attack posed by terrorist? It has to be likely that the interrogator will have the information ahead of the attack as it would be able

[391] Memorandum for the President from Alberto R. Gonzales. Application of the Geneva Conventions on Prisoners of Waw to the Conflict with Al Qaeda and the Taliban, Draft, 25 January 2002.
[392] The list of allowed interrogation methods included hooding, isolation, stress positions, removal of clothing, 20-hour interrogations or sensory deprivation.
[393] Memorandum to General Counsel of the Department of Defense from Rumsfeld, Detainee Interrogations, 15 January 2002.
[394] See Memorandum to Albert Gonzales from Jay Bybee, Office of legal cousel. U.S. Department of Jutice, Standards for Interrogation, 2008.

to stop it. Lastly, there are no other methods how to obtain such information? The government has no other possibilities to pursue the aim and receive necessary information?[395]

The speculations about ticking bomb scenarios became after 2001 so intensified, that even most prominent law professors, such as Alan Dershowitz, started playing with the idea that illicit treatment could be legally used in special and very limited circumstances. He claims, that there is a difference between torturing guilty in order to save the lives of innocent and torturing innocent people. According to Dershowitz, a system which requires an express justification for the use of non-lethal torture and approval by a judge will reasonably honor the prohibition more than a mechanism which relegates these decisions without open accountability. He adds that although torture may be necessary, it may never be right. Nevertheless, the decision should be in the hands of judges keeping the need for these acts as well-founded and lawful.[396]

The questions above, trying to find legal ground for exceptions that justify the prohibition are unfortunately not just hypothetical. The usage of ticking-bomb situations including the exception to the prohibition became reality with the Bush administration and their interpretation of international obligations. However, any legal exception which allows exceptions to this *ius cogens* norm can lead to horrifying results. Governments could use torture arbitrary without the fear of being punished. This may be a slippery slope leading to widespread and systematic measures, as those performed by USA. If powerful countries behave unrestricted, who's to say which country may be the next? Parry claims that the US has used torture as a tool of foreign policy already since start of the 20th century. The argument rests upon some evidence that the US has already used torture specialists during Cold war.[397] With the election of President Obama in 2008, there was a chance that the foreign policy of US will change. Some memoranda expressed outrage regarding torture and rhetoric including transparency of government have certainly changed. Nonetheless, the questionable Guantanamo Bay prison operates until today.

The US has quite obviously violated *ius cogens* law and the international obligation arising from the UNCAT. Yet, here comes the most significant weakness of the UNCAT, as it is non-self-executing, it places no explicit legal obligation to prosecute the crime of torture in national law. Although the UNCAT has a treaty body, Committee against Torture, its

[395] See Association for the Prevention of Torture. *Defusing the Ticking Bomb Scenari: Why we must say No to torture, always,* 2007.
[396] Dershowitz, A. *The Torture Warrant: A Response to Professor Strauss*, New York Law Schoold Law Review, Vol. 48/1, Article 10, 2004, p. 291-2.
[397] Parry, J. *Torture Nationa, Torture Law*, The Georgetown Law Journal, Vol. 97, 2008, p. 1004.

possibilities to prosecute are highly limited.[398] If we consider, the different interpretation of what constitutes as torture (as the above-mentioned memorandums) they have to be taken into account in connection to the duties set in the UNCAT, to which USA is party to. As treaty law rules are interpreted in VCLT, any reservation to the treaty, expressed as a unilateral declaration has to be presented when the treaty is being signed by the country, i.e. there are no legal possibilities to add statements changing the understanding of a provision succeeding the already performed ratification.[399] Additionally, the reservation has to explicitly identify the exact provision or provisions which are affected. Consequently, a later unilateral declaration presented by president Bush did not justify any action performed on the basis of national security if it violated the rights in UNCAT. Nevertheless, the author deems this as an absolutely inacceptable solution to the issue at hand. As Art. 19 of the VCLT declares, some reservations are not allowed, hence a reservation made to the definition of torture would be contrary to the *ius cogens* nature of the fundamental right, leading to diminish the whole purpose of the treaty.[400] Aside from the fact, that any government official, even the president of the USA, has no power to override customary law, not to mention *ius cogens*, it is clearly declared in the mentioned Art. 53 of the VCLT that a peremptory norm can be modified only by subsequent norm of general international law, which has the same character.[401]

At the end of the current subchapter it is necessary to shortly mention the situation in South America. Despite a global surge in terrorism, Latin America has seen a notable decrease in non-state-sponsored terrorism since the Cold War. While the region experienced significant fluctuations in terrorist activity in the past, with peaks in the early 1970s, early 1980s, and the period between 1989 and 1992, a consistent decline has been observed since 1993.[402] Nevertheless, after the terrorist attacks in 2001 the question of terrorism has intensified also in the Latin American region. The first legislative step towards possible threats was the creation and implementation of the 2003 Inter-American Convention against Terrorism. The Convention has been ratified by 24 member countries of the Organization of American States out of 35.[403] According to reports related to terrorism, the vast majority of

[398] Zangeneh, P. *The Gloves Came Off: Torture and the United States after Septermber 11, 2001*,. International Human Rights Law Review, Vol.2013/ 2, 2013, p. 103.
[399] Article 2. para 1. d) of the Vienna Convention on the Law of Treaties, 1969.
[400] Ibid, Art. 19.
[401] Ibid, Art. 53. Authors note: In addition, also national constitutional law poses an obstacle for justification, as two amendments (5th and 14th) to the US Constitution contain the privilege against self-incrimination clause, which places significant limits to the aim of coercive interrogation.
[402] Feldmann, A. *A shift in the Paradigm of Violence: Non-Governmental Terrorism in Latin America since the End of the Cold War*, Revista de Ciencia Políticia, Vol. 25/2, 2005, p. 4-5.
[403] Inter-American Convention Against Terrorism, opened for siganture 3 June.2002, No. AG/RES 1840 (XXXII-O/02), entered into force 15 December 1997.

terrorist attacks in the Western hemisphere were perpetrated in Colombia, by the Revolutionary Armed Forces of Colombia. Unlike other forms of terrorism, the systematic use of terror by Colombian non-state actors stems from the dynamics of the country's protracted internal armed conflict. These groups employ violence against civilians as a deliberate tactic to achieve political and military objectives. Furthermore, there were numerous evidences of connection of the Hezbollah terrorist group to Latin American countries, such as Argentina or Cuba. These ideological sympathizers in Caribbean and South America provided financial funding to the mentioned terrorist group.[404]

In case of Mexico a new method of war is currently being used, known under the notion of war against drug trafficking. Drug trafficking has been an issue of the country for several years and the measures aim to locate, capture and interrogate the internal enemies of the country. The mentioned war was broadened in the recent years and thus created war against drug trafficking and terrorism. The state, often with the help of the US government, aims to fight transnational criminals, who are often militarizes or paramilitarized. Some authors however claim, that some Latin American governments, including Mexico have subordinated themselves to the strategies of the US.[405] Perhaps the most known example of this is the creation of the Guantanamo Bay detention facility on the area of Cuba.[406]

8.4. Perspective of other regions of the world on torture and terrorism

Although the human rights framework in other regions is generally understood as weak (mainly the Islamic and Asian system) the experience with terrorism in these parts of the world has to be shortly discussed.

African human rights system explicitly prohibits torture in the African Charter on Human and People's Rights in its Art. 5. Nonetheless, as in previous parts we have observed, even the African region is affected by the war on terror performed by the USA. Pressure performed by economic and military aid resulted that the extraordinary rendition programms including black sites were happening in African countries. Besides cooperation and authorization of the work of CIA on their territories, several African countries adopted

[404] Sullivan, M. P. Beittel, J. S. *Latin America: Terrorism Issues*, Congressional Research Service, 2014, Abstract.
[405] López and Rivas, G. Global State Terrorism and Assymetric Wars. In Oswald Spring, Ú. And Serrano Oswald, S.E.: *Risks, Violence, Security and Peace in Latin America. 40 Years of the Latin American Council of Peace Research,* Springer, 2018, p. 83.
[406] Since the inception of the Monroe Doctrine, the U.S. has attempted to establish a sphere of influence in Latin America. In most of the countries its influence is obvious.

national legislation after 9/11 to fight the target terrorist groups.[407] Additionally, even the African Court of Justice and Human Rights have added in 2014 terrorism as an international crime to its Statute in Art. 28g. [408] Nonetheless, African countries more likely render suspects to the hands of the CIA, which after 9/11 realized that it would be better to perform these coercive techniques in foreign countries. An illustrative example of the approach related to the treatment of terrorist suspects by the USA can be seen on the case of Talat Fuad Qassim, a radical Islamist connected to Bin Laden and an Egyptian national. During the war in Bosnia the US inquired Bosnia to expel militants found inside its territory. Bosnia extradited Qassim to Egypt, via US navy ship and he was interrogated by the American officials already before taken into Egyptian custody. According to the reports of the human rights watch, US has performed torturous interrogations with the consent of Egyptian government. [409] Another case of Mohammad Al-Asad presents a similar example of a Yemeni citizen, who was transferred from Tanzania to a CIA detention site in Afghanistan. The CIA interrogation there, was again including coercive measures.[410]

In several cases, including those shortly mentioned above, the USA has used external "black sites" detention facilities where suspects are being subject to illicit treatment. The decision to use external places was obviously based on the argument that the human rights framework applies just nationally in the jurisdiction of the ratifying state. The argumentation of US has approved this when in UN reports the government claimed that the human rights do not apply exterritorialy.[411] The UN Committee against Torture has declared that secret detention facilities are infringing the UNCAT.[412] Furthermore, countries which allow these violations of *ius cogens*, drafted in the form UNCAT treaty similarly have responsibility for it. The practical application of some sanctioning mechanism is however, more than problematic.

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[407] The was handy for some countries like South Africa ann its apartheid regime, which employed terrorism laws to suppress opposition to its racist policies.

[408] Whitaker, B.E. *Compliance amond Weak States: Africa and the Counter-Terrorism Regime*, Review of International Studies, Vol. 36, 2010, p. 639.

[409] Human Rights Watch. Black Hole: The Fate of Islamists renderred to Egypt, 2005, [Online], Available at: https://www.hrw.org/report/2005/05/09/black-hole/fate-islamists-rendered-egypt (accessed 3.3.2025)

[410] Bulto, T.S. Tortured Unity: United States-Africa Relations in Extarordinary Renditions and States'Extraterritorial Obligations. In Chenwi, L and Bulto, T.S.: *Extraterritorial human rights obligations from an African perspective*, Cambridge University Press, 2018, p. 181.

[411] Committee against Torture, Consideration of Report Submitted by States Parties Under Article 19 of the Convention: Initial Report of States Parties Due in 1995, Addendum: United States of America. No. CAT/C/28/add. 5, 9 February 2000, para 183-88.

[412] Committee against Torture, Consideration of Report Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committe Against Torture; United States of America. No. CAT/C/USA/CO/2, 18 May 2006, para 17.

Although the far east was not heavily affected by the shift in terrorist measures, China has actively engaged in national and international counterterrorism efforts. This includes participation in twelve UN anti-terrorism conventions, support for the Shanghai Cooperation Organization, and rigorous implementation of Security Council resolutions (particularly 1373 and 1624) through policy, legislation, and administrative measures. While lacking a dedicated anti-terrorism law, China has incorporated counterterrorism provisions into existing legal frameworks via new laws, regulations, and amendments.[413]

Israel is definitely one of the countries struggling the most with terrorism and its threat. Thus, the government felt it necessary to make the possibilities of its agencies as wide as possible to fight these threats. As proven, the Israeli Security Agency has regularly applied techniques, which used moderate psychical pressure when national security issues arose. These acts are declared as legal as the Israeli Supreme court created a loophole when it allowed these acts on the basis of necessity defense. The court's ruling, allowing for ex post facto application of this defense in extreme circumstances, was widely criticized for creating a discrepancy between the absolute legal prohibition of torture and the potential for practical immunity for those who perpetrate it.[414]

When considering other countries and the Middle-East, cases connected again to the US and its use of foreign prisons comes into the discussion. Events of coercive interrogations happened in 2003 in the El-masri case. Khaled El-Masri, suspect of being a member of al-Qaeda had been taken from Macedonia to Afghanistan by CIA officers to secret detention facility. According to reports and interview, El-Masri was regularly ill-treated in order to gain statements and information.[415]

Victims of these extraordinary interrogations or renditions, concluded somewhere like the Middle-East have no possibility to bring a case in front of tribunal. As the Asian regional human rights systems have no present possibility to claim for responsibility of states, there is no form of demanding justice when the states decide to use illicit treatment as a means of interrogation. However, even with an established system these actions maybe problematic, although these countries should be held liable for violations occurred in their jurisdiction.

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[413] Zhe, L. P. China. In Roach, K.: *Comparative Counter-Terrorism Law*, Cambridge University Press, 2015, p. 580.

[414] Israeli Supreme Court, Public Committee Against Torture v Government of Israel, Case No. HCJ 5100/94, 5 May 1999, para 53.

[415] See Satterthwaite, M. *The Story of El-Masri v. Tenet: Human Rights and Humanitarian Law in the ‚War on Terror'*, New York University Public Law and Legal Theory, Working Papers, 2008.

8.5. Concluding remarks to war on terror

After the terrorist attacks in USA the understanding and interpretation of what is terrorism and what means should be used to prevent it have changed. The safety and security of the nation and what can we sacrifice for it became the topic on expert discussions. The ticking bomb scenarios opened up questions where everyone needs to look deep into their soul and answer honestly. You can prevent thousands of deaths maybe even your family's by doing something horrible to one person. Only small group of scholars were able to freely and honestly answer these questions including legal and valid argumentation.

On the other hand, numerous experts and scholars claim, that torture is above-all unethical and immoral. Torture is evil and because of this there is no need in the world that would justify its use. The moral effects of torture are evident not just on the victim but on the perpetrator itself. The person committing these acts learns to treat a human being as if being less or as being an object. The society where such actions are accepted does not stand on values of moral, goodness or fairness. As justice diminishes rule of force emerges.[416] Besides, being unreliable as the information obtained via coercive techniques is regularly just the solution for the suspect how to avoid further illicit treatment, it does not provide any accurancy without further evidence. The suspect truly may not know the needed information. Lastly, if legally used in exceptional situations we may open pandora's box, never really knowing for what and mainly who will governments in the future want to interrogate in order to "protect" their interests.

Within a democratic, rule-of-law framework, no official (military personnel or the president) is allowed to undertake actions deemed illegal or morally reprehensible. The principle of transparency provides a crucial benchmark. All actions must be capable of public disclosure, even if a reasonable delay is necessary. Extralegal actions justified solely by claims of necessity are incompatible with a just legal system. The necessity defense itself must be legally justifiable. History shows that claims of national security necessity have often been the precursor to tyranny. Therefore, all governmental actions must be consistent with existing laws, subject to appropriate checks and balances.[417]

When observing one of the most important fundamental human right, which is by all scholars part of *ius cogens*, some doubts arise. We have seen that the powerful countries, as

[416] Kadish, S. H.*Torture, the State and the Individual*, Israeli Law Review, Vol. 23/2-3, 1989, p. 345.
[417] Dershowitz, A.M. *The Torture Warrant: A Reponse to Professor Strauss*, New York Law School Law Review, Vol. 48/ 1, Article 10, 2004, p. 293.

USA analyzed above, have the strength to act as they wish in geopolitics. The case of Al-Nashiri presented that European countries (in the current case Poland and Romania) are also somewhat incapable when the USA demands cooperation in human rights violations. Not to mention the African and Asian regions, where the lack of proper human rights system caused the creation of black-sites. What is the situation with accountability? It is like looking for a needle in a haystack. The Asian human rights system has no platform. The African is relatively weak even in less problematic questions. The Inter-American may have a platform, which is rather functional, still USA has strong influence over it's most "problematic" actors. Hence, we may state that the only effective actor worldwide is the Council of Europe and the ECtHR platform. This may lead to the core hypothesis of the dissertation: is prohibition of torture in fact *ius cogens*, when its acceptance and recognition is this small?

IX. Torture and asylum law

Asylum, defined as a state's grant of protection within its territory or under its control to individuals seeking it, is a well-established institution in international law.[418] The refugee status is the one which defines the content of protection. Asylum on the other hand, represents the institution of protection itself. These are related but separate concepts. More recently, the notion of international protection, has emerged as an umbrella term encompassing the protection afforded by states to various individuals, including those not meeting the definition of refugee but who nevertheless receive protection under other legal frameworks.[419]

The concept and practice of asylum significantly predate the formalization of the modern international legal systems designed to protect refugees and uphold human rights. While the international refugee protection regime gained prominence during the interwar period of the twentieth century, and the comprehensive framework for international human rights protection was established by the United Nations following the adoption of the Universal Declaration of Human Rights in 1948, the practice of granting asylum to individuals seeking refuge has a much longer history rooted in customary international law and state practice. Asylum, in its fundamental form, represents the act of a state granting protection to an individual within its territorial boundaries, a concept known as territorial asylum, or in locations that are under the state's control, authority, or jurisdiction, such as diplomatic missions (embassies and consulates), naval vessels, or other designated areas. This long-standing practice underscores the humanitarian and legal significance of offering refuge to those facing persecution or danger in their home countries, even before the establishment of the formalized structures designed to address these concerns in the 20th century. The enduring nature of asylum as a practice highlights the importance of state sovereignty and the inherent responsibilities associated with protecting vulnerable individuals, regardless of the specific legal frameworks which have evolved subsequently.[420]

The asylum law's aim is to protect persons, whose migrated to a safe country when real harm or the possibility of real harm occurred in their residual home countries. As these people are in an extremely vulnerable position, international norms were created to provide

[418] Article 1 of the Asylum in Public International Law, resolutions adopted at its Bath Session by the Institute of International Law (5th Commission), 1950.
[419] Gil-Bazo, M-T. Guild, E. The Right to Asylum. In Costello, C.: *The Oxford Handbook of International Refugee Law*, 2021, p. 867.
[420] See Grahl-Madsen, A. *Territorial Asylum*, Stockholm: Almqvist and Wiksell International, 1980.

protection besides the possibility to enjoy the scope provided on national level. The UN demands the respect for the principles, which has a strong impact also to those who fled their previous place of life. The right to seek asylum must be interpreted in light of, and subject to, the rights contained in subsequent human rights conventions. Numerous of these conventions include requirements which have to be taken into consideration when procedures regarding the future of the refugee are taking place. While states have wide scope of jurisdiction to decide in refugee or migration matters, the developments in asylum law being part of human rights law are significant.[421]

The asylum law has strong connection to the prohibition of torture and other forms of illicit treatment. First of all, there is the issue of treatment of refugees and migrants, where the state forces (such as police or military) have to keep in mind that the people affected are in an extremely vulnerable position. Frequently refugees, have run from their home to an unknown country for them. They have no money, no place to get shelter, no job, no knowledge of the language and have no one to ask for help. These situations may cause the higher sensibility of refugees. Consequently, the authorities have to treat them especially carefully not to cause any psychological pressure leading to possible degrading treatment. Secondly, the well-known principle of non-refoulment comes into play, which creates obstacles to any arbitrary expulsion and return of a person to a country where there is a real risk of irreparable harm, such as illicit treatment. The general non-refoulment obligation is not absolute. The exception to the rule is national security, where the person constitutes danger to the community. Nonetheless, there are no exception when a real possibility of torture is in question. The universal human right framework as well as the framework provided by regional human rights protection systems enhances the non-refoulment principle in their legislative texts. Furthermore, different human rights courts apply the notions stemming from treaty law when necessary. The latter includes interpretation of the asylum protection in relation to the topic torture. The following chapter will be dealing with this connection and presenting different approaches thorough different human rights systems.

[421] Edwards, A. *Human Rights, Refugees, and the Right "To Enjoy" Asylum*, International Journal of Refugee Law, Vol. 17, 2005, p. 301-2.

9.1. Dangers to Asylum seekers: European perspective

Obtaining detailed information about conditions in immigration detention centers is difficult, however increasing media reports reveal widespread concerns about inhumane treatment. The detention of migrating children and unaccompanied minors is becoming increasingly prevalent technique used across the EU, despite the existing and contravening international standards and national legislation protecting children's rights.[422] Additionally, in several EU countries (including the Netherlands, France, and Malta), detained immigrants experience conditions which are deemed as harsher than of those being kept in prison for criminal acts. Not to mention, that the flow of immigrants is continuous, which causes logistical issues regarding their placement. Consequently, some countries use police detention facilities for immigrants, where they are being kept together with persons committing criminal offences.[423] Keeping in mind their especially vulnerable position, the lack of proper circumstances infused with the lack of proper health care leads to the graduation of mental health issues among the immigrants.[424]

One of the primary and core focuses of the work of the European Committee for the Prevention of Torture is the control of circumstances in administrative detention performed for the fleeing immigrants. Several specialized agencies help the Committee here, providing reports regarding the treatment of immigrants. As above-mentioned, the fact that the asylum seekers are in an extremely vulnerable position and deprived of their liberty, the additionall frequency of keeping them in prison facilities, leads to the heightened position of the Committee. Concerning detention conditions, the Committee's consistent position is that immigration detainees should not be held in prisons or standard law enforcement facilities, as such environments are inappropriate for individuals not convicted of or suspected of criminal offenses. Thus, it urges states to cease this practice.[425]

Since the 2015 influx of migrants, the media has continuously spread misleading information on the situations regarding the flow of third country nationals into the European

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[422] See Bolton, S. *Briefing Paper: The detention of children in Member States' migration control and determination processes*, European Parliament, Directorate-General Internal Policies, Citizens Rights and Constitutional Affairs, 2006, See Hassanová, R.L. *Protection of Children under International Law*, Central and Eastern European Legal Studies, Vol. 1/2020, 2020.

[423] Kalmthout, F.D.A.M and Hofstee-van der Meulen, F.B.A.M. *Foreigners in European Prisons*, 2007, p. 55.

[424] Cornelisse, G. *Immigration Detention and Human Rights. Rethinking Territorial Sovereignty*, Leiden, Boston, Nojhoff Publishers, 2010, p. 4.

[425] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Appendicies to the response of the Government of Greece to the report on the visit carried out to Greece from 27 August to 9 September 2005, 20 December 2006, para 24.

Union. It resulted in the confusion of different notions, mainly to the terms migrant and refugee. From the legal point of view, the status of a refugee was established after WW II., for a person who has fled its own country in a fear of persecution. These people fear unjust persecution, war or violence and are unable to return to their country of residence unless the circumstances are safe again. The fundamental protection to them is provided by the 1951 Convention related to the status of refugees. Although, an asylum seeker is a person who is claiming for being a refugee and getting protection from the destination country, it is quate regular that the term is interchangeable with the term of refugee.[426] On the other hand, an immigrant or migrant is a distinct notion. Migrant people are those who make a conscious decision to leave its country of residence in order to resettle in another country. Many migrants who have entered the territory of EU have legitimate grounds for their decision but either missing necessary documentation or waiting for its application to be administratively processed. These migrants are those we call as irregular migrants, as they have moved to the country without preparing the administration ahead of their decision to move. For this reason, there is valid requirement for their temporal detention.[427] Nevertheless, until asylum seekers are refused to get the refugee status, they are not considered as irregular migrants. Thus, detention shall be an exceptional measure applied to them, just until the outcome of the refugee status decision has been made. Their special status was emphasized by the Committee in 2017, when it declared, that the protection of asylum seekers is even beyond the protection of irregular migrants as it should have a wide selection of safeguards, including separation from them.[428] Nonetheless, certain rights, such as the prohibition of torture shall be abided by irrespective of the position of a status of a foreign person.

Asylum seekers, being in an especially vulnerable position, are easily affected by poor mental and psychical health. These people have fled their county looking for safe space. They are deprived of a familiar cultural atmosphere, including family and friends. They suffered and may even still suffer from uncertainty. Numerous immigration detention facilities have issues caused by overpopulation. These lead to inadequate hygiene and medical care. The case-law of the ECtHR has highlighted that the detaining state has the direct responsibility to

[426] Article 1 of the Convention and Protocol relating to the Status of Refugees adopted by the UNGA resolution 2198 (XXI), 16 December 1966.
[427] As there is no universally accepted definition for the notion of migrant or irregular migrant the author used the understanding in several books and documents: Bantekas, I. and Oette, L. *International Human Rights Law and Practice*, Cambridge University Press, 2020, p. 602.; Bicknell, Ch., Evans, M. And Morgan, R. *Preventing Torture in Europe*, Council of Europe Publishing, 2020, p. 142. United Nations Department of Economic and Social Affairs, Recommendations on Statistics of International Migration, Revision 1, 1998, para. 32
[428] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Factsheet for immigration detention, No. CPT/Inf/(2013)3, 2017.

provide minimum health conditions. This includes medical screening of the newly arrived persons, supervision of minimum hygiene as well as providing necessary arrangements when the detained is asking for medical help. All of the measures taken must fulfill the legal requirements, including proper knowledge of the pertinent person in a language he/she it understands as well as keeping the information confidential.[429]

Landmark decision related to the proper treatment in immigration facilities and probably the most cited is the case of M.S.S. against Belgium and Greece. The case at hand was concerning allegations of the applicant that his expulsion violated Art. 2 and Art. 3 of ECHR, in addition to the violation of Art. 3. The claim regarding the violation of Art. 3 was concerning his treatment in Greece, where immediately upon his arrival, was placed in a severely overcrowded detention facility adjacent to the airport. He was held in a cramped cell with twenty other detainees, with limited and controlled access to sanitation, no outdoor time, minimal food, and forced to sleep on a dirty mattress or the bare floor.[430]

The ECtHR in the present case emphasized, that while it is important for states to address the rising efforts to bypass immigration laws, they must not deny asylum seekers the protections guaranteed by international agreements. Regarding the determination of whether treatment reaches a minimum severity level, it declared that it is rather subjective, taking into account all circumstances, including the duration and impact of the treatment physically or mentally, as well as considerations like the victim's gender, age, and health. The Court classifies treatment as inhuman, if it is intentional, prolonged, and results in physical injury or severe physical or mental suffering. Treatment is deemed as degrading, if it humiliates or lowers a person's dignity, promoting feelings of fear, anguish, or inferiority that could undermine moral and physical resilience. It is sufficient for the victim to feel humiliated personally, regardless of others' perceptions. In addition, the Court in the present case somewhat ignored the definition of torture established in Art. 1 of the UNCAT and broadened its scope, when it set that the intention to humiliate can be considered, however its absence does not prevent a violation of Art. 3 from being established.[431] As already mentioned above, the Court finds it essential to make a distinction between asylum seekers and illegal migrants. In this sense it considers the context of the applicant's detention and, contrary to the Greek Government's claims, the applicant did even initially appear to fit the profile of an asylum-seker and not an illegal immigrant. In fact, it was proven that the Greek authorities were

[429] Bricknell, Ch. Evans, M. And Morgan, R. *Preventing Torture in Europe*, Council of Europe Publishing, 2020, p. 148.
[430] ECtHR, M.S.S. v Belgium and Greece, Application No. 30696/09, Judgment, 21 January 2011, Para 34.
[431] Ibid, para 216-220.

aware of his identity and understood he was a potential asylum seeker. Despite this, he was promptly detained without any explanation provided. The Court believes that the combined sense of arbitrariness and the related feelings of inferiority and anxiety, along with the significant impact these detention conditions have on an individual's dignity, amounted to degrading treatment that violates Art. 3 of the Convention. Furthermore, it repeatadly emphasized, the applicant's distress was heightened by the inherent vulnerability of his position as an asylum seeker.[432]

In the ECtHR decision A.I. and other against Greece from 2024, Greece was held accountable for being unable to provide proper living conditions to applicants who had fled Afghanistan on grounds of fear. The overcrowded facility at hand, called as Idomemi-camp could not provide adequate sanitation facilities or adequate nutrition. The escalated position of the applicant was due its health issues, such as lung problems, fever ande bleeding cyst. The Court taking into account the mentioned situation in the camp have come to a decision that the minimum level of severity with regard to Art. 3 of the ECHR has been reached in the present situation. Altought, the Court did not declare explicitly which subnotion of Art. 3 was violated, we may assume that it was the least severe form, degrading treatment.[433]

Various cases related to the conditions in immigration facilities were dealing with the question of children and their special position when detained together with their family. The R.R. and other against Hungary was likewise trying to define how states have the enhanced obligation when trying to protect children from any degrading or inhuman living conditions. The case concerned a family who fled first Afghanistan and later Iran. Searching for safety they arrived to Serbia and continued their trip to Hungary where they were detained in the Röszke transit zone. The Court considered children being in extremely vulnerable position, they have specific needs based on their age and the lack of independence, not to mention their asylum-seeker status. In this sense the Court stipulated, that asylum-seekers, who are children as well as pregnant women are eligible for preferential treatment. In the pertinent case the applicants were claiming the violation of Art. 3 based on numerous factors. Bad conditions in the transit zone, suffering from heat, medical help given but not translated and the presence of male police officer on gynecological medical examinations. Several claimed circumstances did not reach the threshold of Art. 3, however some actions did. The Court assessed that presense of a male officer during the pregnant mothers' medical examinations must have caused a degree of discomfort. The children may have felt fear when they have been

[432] Ibid, para 223-234.
[433] See ECtHR, A.I. and others v Greece, Application No.12958/16, Judgment, 18 January 2024.

constantly accompanied everywhere by armed guards, as the situation resembled prison conditions. Moreover, the lack of professional psychological assistance available for traumatized asylum-seekers including children is often necessary.[434]

The detention of refugees, seeking international protection can severely jeopardize their legal standing. Not only are they often unaware of their right to apply for asylum while detained, but in certain instances, detention actively obstructs their access to the asylum procedure. These obstacles were observed by the Committee regularly in circumstances when person is detained on an airport in transit holding room. Serious concerns were raised to the mentioned situations. The police force when detaining foreigners crossing the borders are generally not able to communicate with the immigrant as they do not speak a language they would understand. As a consequence, these people are not aware of the reasons of their detention and the possibilities of seeking legal help. The Committee has raised its concerns regarding airport facilities particularly to Austria, Belgium or Germany.[435] Nonetheless, the airport transit zones are also a place for holding immigrants deprived of the personal liberty, the governments presented their arguments that the Committee may have gone beyond its mandate. The justifications of the states were based on their interpretation of Art. 5 of ECHR. These zones were not facilities from where a person cannot leave. The incoming people to the country were free to go back to their country from which they came. They were only kept from entering their territory, thus protecting their borders, which they had every right to. In this sense the measures were not in reality limiting their right to liberty and security.[436] Nonetheless, the argumentation of the countries regarding the scope of jurisdiction of the Committee may be valid, the absolute prohibition of torture, cruel, inhuman and degrading treatment stands still irrelevant whether the countries apply the ECHR or their national legislation.

[434] ECtHR, R.R. and others v Hungary, Application No. 36037/27, Judgment, 5 July 2021, para 58-65.
[435] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Report to the Government of Austria on the visit carried out to Austria from 20 to 27 May 1990, No. CPT/Inf (1991)10, 3 October 1991; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; Report to the Government of Belgium on the visit carried out to Belgium from 18 to 27 April 2005, No. CPT/Inf (2006)15, 20 April 2006; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Report to the German Government on the visit to Germany from 3 to 15 December 2000, CPT/Inf (2003)20, 12 March 2003, para 60.
[436] 7th General report on the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment's activties, coverint the period 1 January to 31 December 1996, No. CPT/Inf, 1997, para 25.

9.2. Non-refoulment principle in European perspective

It has to be generally accepted that states, the sources of any international subjectivity and the bearers of sovereignty have the right to protect their national interest, including the protection of the populations' security. Logically, this encompasses the right to protect their borders and to expel any foreign persons which may constitute threat to these values. States are universally those which decide who can enter and stay on their territory and in their jurisdiction. Nevertheless, the principle of sovereignty is not unlimited and states have some obligations stemming from international human rights law. Their discretion is limited by the well-known and already mentioned principle of non-refoulment.

The principle of non-refoulement is a fundamental pillar of international refugee protection, serving as a crucial safeguard against the return of refugees to places where they face serious risks or harm. This principle was first firmly established in the 1951 Refugee Convention. Art. 33 of this Convention explicitly states that no Contracting State shall expel or return ("refouler") a refugee in any manner to territories where they would face threats to their life or freedom based on their race, religion, nationality, membership in a particular social group, or political opinion.[437] The principle in the Refugee Convention is not founded in the prohibition of torture, as in other treaties analyzed below. The non-refoulment here is connected to the definition in Art.1, which means that if there are any of the set reason for a possible persecution of a person he/she cannot be refouled to that country.[438]

Beyond its foundational role in the 1951 Refugee Convention, the principle of non-refoulement has been reinforced in numerous international human rights treaties at both global and regional levels. It plays a pivotal part in ensuring that individuals are not subjected to torture or cruel, inhuman, or degrading treatment or punishment, further embedding itself as a core tenet of international human rights law. This extensive recognition underscores its vital importance in protecting vulnerable populations worldwide from persecution and harm.

We may observe the principle in numerous conventions devoted to the topic of prohibition of torture as well as human rights frameworks. The UNCAT declares the binding nature of the principle in its Art. 3. It is the first convention which explicitly stipulates a ban on refoulment in the event of a threat of torture. However, it is obvious that the wording was influenced by the Rerfugee Convention, the UNCAT goes further. It establishes the protection from expulsion both to foreigners (even if illegally entered the territory) and citizens from

[437] Convention and Protocol relating to the Status of Refugees, 1951.
[438] Ibid, Art. 1A(2).

sending them to an unsafe country. It connects to an obligation, that states have the duty to analyze the situation in the territory where they would send the pertinent person. As the notes from the drafting process presents, the discussion during the creation dealt with the question whether to incorporate specific situations into the provision. These would have been apartheid, genocide, occupation or racial discrimination. However, the drafters came to a conclusion that these would narrow the scope of possible application, and thus it would be more proper to adapt a case-by-case investigation.[439]

The ICCPR does not include explicitly the non-refoulment principle in its wording. However, the Human Rights Committee has declared several times that some provisions indirectly include the principle. These may be Art. 6 (right to life) and naturally Art. 7 (prohibition of torture). The Committee stipulated that the application of the Art.7 similarly to the application of Art.3 of the ECHR has to be applied where there is a risk of extreme danger in the receiving state, particularly when vulnerable people are concerned. It adds that the necessary and foreseeable consequence has to be sufficiently proven. The possible ill-treatment has to be connected personally to the applicant.[440] The sending country has to perform a thorough examination of both the general human right situation and both the personal argumentation on behalf of the applicant. Consequently, the burden on the state is quate heavy, which is even greater considering that the Committee is regularly investigating the procedural guarantees of the applicant, regaring his effective remedy to the decision.[441]

According to the ECHR each signatory state has the obligation to secure the rights and freedoms declared in the Convention for everyone in their jurisdiction, i.e. it does not make any exception between citizens or foreigners on their territory. Similarly, as in the ICCPR, there is no explicit provision of the non-refoulement principle. However, if we read the mentioned first article in conjunction with the general prohibition of torture in Art. 3, we come to the same conclusion as the ECtHR did, that certain expulsion or extradition may cause a serious risk of ill-treatment to a person. Consequently, the ECtHR is not obliged to ensure entry and residence rights for every foreigner in Council of Europe countries, but it may stop these countries sending back persons to feared territories. As Thurin states, the aim

[439] Suntinger,W. *The Principle of Non-Refoulement: Looking Rather to Geneva than to Strasbourg?,* Austrian Journal of Public and International Law, 1995, p. 209.
[440] Human Right Committee, K v Denmark, Communication No. 2392/2014, 16 July 2015, Para 7.2
[441] Human Right Committee, M.I. v Sweden, Communication No. 2149/2012, 25 July 2013, Para 9.

of the ECHR drafters was to create a comprehensive Art. 3, which would develop through time.[442]

Althought, in principle there is no hierarchy between rights of the ECHR, every scholar agrees that the Art. 3 has a special importance in international law and jurisprudence of the ECtHR. In this meaning Art. 3 has prevalence over Art. 2, which is not absolute and is definitely nort part of the *ius cogens*. Nevertheless, according to the ECtHR, issues arising under Art.2 and Art. 3 in the context of refoulement can be easily linked.[443] As a result, the Court addresses complaints related to refoulement based on Art. 2 within the framework of Art.3. This means that the right to life does not provide any additional safeguards against refoulement, beyond what is already ensured by Article 3 ECHR in practice. There are case examples in which the Court has referenced both articles in relation to refoulement. However, in these instances, the Court has relied exclusively on the principles established under Art. 3.[444]

Even if the principle non-refoulement arises, it is generally considered as exceptional, reflecting the fundamental importance and absolute nature of these protections. Additionally, the case-law emphasized, that the limits to the expulsion of foreigner does not automatically extend to other provisions of the ECHR. The Court had noted that, the human rights framework cannot demand from states, to stop eny expulsion. Moreover, it would be unreasonable not to return an individual to a country that fully and effectively upholds all the fundamental rights and freedoms. Nonetheless, the Court has acknowledged a degree of extraterritorial application for two additional rights protected by the ECHR, ie. the right to a fair trial under Art. 6 and the right to liberty and security under Art. 5. However, the Court acknowledged the possibility of the reinterpretation of the principle in the future, if the developments of society would require different approach.[445]

With regards to Art. 6, it does not normally apply to asylum cases. Nevertheless, already in the Soering case the Court discussed the possibility to deny the expulsion on the basis of flagrant denial of fair trial. The notion of flagrant denial of fair trial was interpreted more by the Court in the Ahorugeze v France case where it stipulated that a flagrant denial of justice goes beyond mere irregularirites.[446] The breach of Art. 6 is severe to the limit that it

[442] Thurin, O. *Der Schutz des Fremden vor rechtswidriger Abschiebung, Das Prinzip des Non-Refoulement nach Artikel 3 EMRK*, 2., ed., Wien, 2012, pp. 12–14.
[443] ECtHR, H. N. V Sweden, Application No. 30720/09, Judgment, 15 May 2009.
[444] ECtHR, Bader and Kanbor v Sweden, Application No. 13284/04, Judgment, 08 November 2005.
[445] ECtHR, Hirsi Jamma and Other v Italy, Application No. 27765/09, Separate opinion of Pinto de Albuquerque, 23 February 2012.
[446] ECtHR, Ahorugeze v Sweden, Application No. 37075/09, Judgment, 27 October 2011.

amounts to nullification or destruction of the very essence of the right itself. Indeed, the international practice has highlighted such approach by the denial of various countries as well as the International Tribunal for Rwanda to extradite on the grounds of likely violations of the right to fair trial. Moreover, if there is real risk of obtaining evidence by illicit treatment when returned to country, we speak about both the possible violation of Art. 3 and Art. 5.[447]

The reason for the denial of expulsion may be the combination of Art. 3 and Art.5. The combination of these articles was observed in the unavailed secret detention camps established in Europe by the CIA for terrorist suspects.. In this respect the ECtHR stated that the unacknowledged detention of a person is a complete negation of Art. 5.[448] However, the topic has been sufficiently examined in the previous chapter.

The non-refoulment principle has a highlighted position, when the person is being subject to administrative expulsion based on failed asylum seeking, or is being extradited. Foreigners whose status in the country has not been either regularized or who had been admitted just temporarily, can rely on either Art. 1 of Protocol 7 to the ECHR or the non-refoulment. The mentioned protocol guarantees certain procedural rights of aliens from expulsion to a third country. Nevertheless, the countries often rely on the justification that the return of foreigner is imminent as it is the interest if public order or based on national security of the country. There have been a few cases in which the Court has ruled that the provisions of the protocol were breached due to the expulsion of former residents not being conducted in accordance with appropriate legal procedures. In these cases, the individuals affected were not even afforded the opportunity to present their objections against their expulsion.[449]

In the realm of procedural guarantees pertaining to expulsion or extradition proceedings, the right to an effective remedy as articulated in Art. 13 of the ECHR has emerged as a crucial element. This specific provision mandates that states are obligated to offer an effective remedy within their domestic legal framework for any arguable claim that pertains to one of the rights safeguarded by the Convention. The applicability of the article extends to a variety of contexts, including asylum and extradition cases, as well as other removal procedures that may present potential issues under Art. 3, or even Art. 8, which addresses the right to respect for private and family life. This broad applicability underscores

[447] Weck, F. *Non-refoulment under the European Convention on Human Rights and the Un Convention against Torture. The Assessment of Inidivual Complaints by the European Court of Human Rights under Article 3 ECHR and the United Nations Committee against Torture uner Article 3 CAT*, Leiden, Boston,Brill Nijhoff. 2014, p. 25.

[448] ECtHRm Al-Nashiri v Poland, Application No. 28761/11, Judgment, 24 July 2014, para 529.

[449] See ECtHR Lupsa v Romania, Application No. 10337/04, Judgment, 8 June 2006; ECtHR, Bolat V Russia, Application No. 14139/03, Judgment, 5 October 2006; ECtHR, Takush v Greece, Application No. 2853/09, Judgment, 17 January 2012.

the necessity for states to establish strong mechanisms that allow individuals to challenge decisions that might infringe upon their rights. To be considered truly effective, a remedy must adhere to specific criteria designed to ensure that it provides adequate protection for individuals' rights. This includes the timely availability of the remedy, accessibility to the process, and the provision of appropriate legal assistance, as well as an impartial and thorough examination of the claims made. Ensuring these standards are met is vital for upholding the principles of justice and human rights in the context of expulsion and extradition proceedings. Thus, the significance of Art. 13 cannot be understated, as it serves as a critical safeguard for individuals facing potential violations of their rights.[450]

Those foreigners waiting to be returned that fear illicit treatment after their expulsion by a country may turn to the ECtHR for investigation of the circumstances at hand. When there is future risk of possible threat or illicit treatment itself to the applicant the Court may issue interim measures. These measures are aimed to preserve the status quo until the Court decide whether the expulsion would infringe the principle of non-refoulment or whether the state has decided properly. Hence, the country has to wait with the expulsion, until there is a final decision in the matter.[451] Generally, one may observe, that these measures are applied by the Court solely in cases where is a real risk of violation of Art. 2 and Art. 3.[452] Accordingly, these provisional measures are existing to prevent irreperable harm and in genuinely exceptional case.[453]

Even though majority of requests for interim measures are denied, those which are granted by the Court are adhered to by the states. Accordingly, the applicant is staying on the territory of the country waiting for the decision of the ECtHR. If the judgment of the ECtHR approves[454] his application, and the principle of non-refoulment comes effective, the country is banned from sending the person to the chosen country. Nevertheless, the Court does not set the demand for attributing the person with a concrete legal status, ie it does not necessarily

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[450] Weck, F. *Non-refoulment under the European Convention on Human Rights and the Un Convention against Torture. The Assessment of Inidivual Complaints by the European Court of Human Rights under Article 3 ECHR and the United Nations Committee against Torture uner Article 3 CAT*, Leiden, Boston,Brill Nijhoff. 2014, p. 31.

[451] Although there is no explicit provision in the ECHR that allows the ECtHR to apply interim measures, the country are obliged to abide by it. The obligation stems in the case-law of the Court, ie in the Mamatkulov and Askarov v Turkey case the Court held that the ignorance of interim measures by state violates Art. 34 of the ECHR.

[452] There are few exceptions, where the ECtHR applied interim measures in relation to possible harm to Art.8. E.g. ECtHR, Neulinger and Shuruk v Switzerland, Application 41615/07, Judgment, 6 July 2010.

[453] Rieter, E. *Preventing Irreparable Harm. Provisional Measures in International Human Rights Adjudication*, Intersentia, Antwerp, Oxford, Portland, 2010, p. 265.

[454] We may add here that the ECtHR in the matters of non-refoulment does not make any traditional distinction of the terms of illicit-treatment, ie torture, inhuman or degrading treatment.

mean that the person was granted refugee status. It has been stated in Ahmed Ali v Netherlands, that Art. 3 does mean protection but not guarantee some additional rights, such as right to residence permit.[455]

It is a fact, that the Committee against Torture's decisions are not binding under international law. Nevertheless the ECtHR may provide a great possibility for seeking help in asylum matters. The good chance of asylum-seekers when using non-refoulment, consequently causes huge amount of similar applications. The effectiveness and credibility of the ECtHR due to its overburdening is in question. The number of asylum-seekers cause still heavy pressure of national interests of states. Yet, the human rights framework attempts to fight the increasing adoption of restriction measures related to asylum policies in member countries. The reason stems in the core of the framework: protecting humanity and its fundamental values.[456]

In the realm of refoulement, the absolute ban on torture is critically important. This means, that exceptions are not allowed when there is a risk of torture, irrespective of the circumstances facing the state or the background of the individual being expelled. The Committee against Torture has repeatedly emphasized in its decisions that even criminals or those perceived as national security threats are not exempt from this prohibition.[457] Indeed, the principle is the practical application of the prohibiton of torture and it is generally understood as customary law. The principle is recognized by the international community as a whole ant it has place and application in every regional human rights system. Interestingly, the effective application of the prohibition of torture, even though having *ius cogens* strength, is less consistent, than the application of the non-refoulment principle.

When asylum-seekers fail in the „hunt" for residence based on national regulation, they search for any grounds how to stay safe. The fundamental provisions related to the refugees stem from the Refugee Convention, however the Convention gives protection only from persecution based on unfair reasons. The legal status of the person does matter. Nonetheles, what happens when the person has no personal reasons to fear persecution but still the circumstances of his return may pose a real and imminent risk of being tortured. Here comes to play the principle of non-refoulment, stemming both from UNCAT and the ECHR,

[455] ECtHR, Ahmed Ali v Netherlands and Greece, Application No. 26494/09, Judgment, 24 January 2012, para 19.

[456] Boulesbaa, A. *The U.N. Convention on Torture and the Prospects for Enforcement*, The Hague, Boston, London, 1999, p. 293; Chetail, V. *Le Comité des Nations Unies contre la torture et l'éloignement des étrangers: dix ans de jurisprudence (1994–2004)*, Revue Suisse de droit international et européen, 2006, p. 101.

[457] Comittee against Torture, Algiza v Sweden, No.233/2003, Decision, 20 May 2005; Dadar v Canada, No. 258/2004, Decision, 29 November 2004; Abdussamatov and 28 Others v Kazakhstan, No. 444/2010, Decision, 1 June 2012, Abichou v Germany, No. 430/2010, Decision, 15 July 2013.

which can be invoked as a last resort. The principle applies here to everyone, whis means that even undesirable and possibly dangerous people have the access to this fundamental human right.[458]

9.3. Inter-American perspective

Although it may be not that obvious from the media reports in Europe, the Latin American region is likewise affected by the immigration issues. Even though the migration is most relevant from the Latin America and Carribbean to Northern America, as the research of the World Migration report states, there are over 3 million foreigners coming to the region of South America. These are mostly Europeans and North Americans. By the end of 2022, there were over 234,000 registered Venezuelan refugees and more than one million individuals with pending asylum applications. Additionally, Nicaragua, Honduras, and Cuba are the source of a substantial number of asylum seekers. Peru, Mexico, Brazil, and Costa Rica are among the countries in the subregion hosting the largest numbers of these asylum seekers.[459]

Numerous insitutions watch over the observance of the human rights standards drafted and implemented in the region. Asylum was first declared as a human right in Art. XXVII in the ADHR as the right to seek and receive asylum in foreign territory if there is an attempt to capture him not on the basis of ordinary crimes.[460] ACHR sets in its Art. 22 the freedom of movement and residence, where it declares in para 7. that: "*Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes."* The following paragraph is furthermore setting the legislative basis for the non-refoulment principle, which will be analyzed in the further chapter. [461] Nonetheless, the region has a long-standing history of granting refugee status. We may mention the Motevideo Treaty on Political Asylum and Refugee from 1939 or the Caracas

[458] McAdam, J. *Australian Complementary Protection: A Step-By-Step Approach*, Sydney Law Review, 2011, p. 728.
[459] UN World Migration Report, Migration and Migrants: Regional Dimensions and Developments, [Online], Available at: https://worldmigrationreport.iom.int/what-we-do/world-migration-report-2024-chapter-3/latin-america-and-caribbean; Accesed: 28.01.2025 (accessed 24.3.2025).
[460] Article XXVII of the American Declaration of the Rights and Duties of Man reads as follows: „person has the right to seek and receive asylum in foreign territory, in case of pursuit not resulting from common law crimes, and in accordance with the laws of each country and with international agreements", 1948.
[461] Article 22 of the American Convention on Human Rights, 1969.

Convention on Territorial Asylum from 1954.[462] Finally, it is necessary to mention the Cartagena Declaration on Refugees from 1984, which aimed to harmonize those obligations which stem from the UN treaties concerning the refugee status.[463]

The perspective of what enhances the asylum protection has been specified and mostly broadened by the Inter-American Commission. The most influential interpretation may be seen in the Haitian Interdicitions case, which interprets the right to asylum as a protection of persons whose life or liberty is threatened or endangered by acts of persecution or acts of violence on behalf of the state. [464] The Commission has furthermore elaborated on the scope of the right to seek asylum, as it emphasized, that the procedural part of the right is based mainly on the principle of hearing the person.

Over the years, the IACtHR has evolved from being a relatively inactive court to an innovative and responsive institution. It had an impact in the understanding of human rights in connection to the migration and the risks connected to possible human rights violations which may stem from it. The Court has over the years presented in the matter, various advisory opinions and provisional measures which has a goal to provide protection both to asylum seekers and refugees as well as any migrants.[465] The core of the generall provisions, irrespective of the migration status, are to effectively face collective expulsion measures. The progressive approach of the Court was seen also in its advisory opinion, which comprises not just states which ratified the ACHR, but all of the signatory states of the ADHR.[466]

The IACtHR has in numerous cases broadened the scope of Refugeee Convention, mainly in accordance with the principle of non-refoulment. The Vélez Loor case concerned an Ecuadorian citizen who entered Panama three times illegally. The first two times he was expelled from the country, however the third time the authorities arrested him, which was followed by a 2-year prison sentence. Mr. Vélez Loor was claiming that he experienced inhumane conditions in the Panama prison. The Inter-American Commission has in fact found these allegations to be true and recommended the Panamanian State to fully compensate the

[462] Treaty on Political Asylum and Refugee, Montevideo, Uruguay, opened for signatures 4 August 1939, entered into force 29 December 1954; Convention on Territorial Asylum, Caracas, Venezuela, opened for signatures 28 March 1954, No. 24378, entered into force 29 December 1954.
[463] Cartagena Decalaration on Refugees, Cartagena, Colombia, No. OEA/Ser.L/V/II.66/doc.10, 22 November 1984.
[464] Inter-American Commission on Human Rights, Haitian Centre for Human Rights et al v USA, Case No. 10675, Commission report. N. 51/96, 13 March 1997.
[465] Cantor, D.J and Barichello, S.E. *The Inter-American Human Rights System: a new model for integrating refugee and complementary protection?,* The International Journal of Human Rights, London: Routledge, 2013, Vol. 17, n. 5–6, p. 689-706.
[466] See Inter-American Commission of Human Rights, Derechos humanos de migrantes, refugiados, apitridas, victimas de trata de personas y desplazados internos: Normas y Estandares del Sistema Interamericano de Derechos Humanos, 31 December 2015.

victim, to implement measures which would prevent inhuman treatment and to ensure that immigration proceedings are conducted before a competent and independent judicial authority. It had been proven, that the applicant was first held in an immigration shelter, afterwards in an overcrowded prison center together with persons accused and sentenced for criminal offences.[467] The Court declared, that States cannot justify their prison conditions with economic issues. As persons deprived of their liberty are in a vulnerable position, the minimum international standards to respect their human dignity have to be abided in every situation. The position of a foreigner is even heightened in these circumstances, hence allocating them in improper conditions together with those serving sentence may more likely cause irreparable mental and possibly even physical harm to them. In the case of migrants or asylum-seekers, detention based solely on their "unknown" status should be used when it is necessary and proportionate.[468] Thus, according to the Court, the country has violated several rights included in the ACHR, such as Art. 5, right to humane treatment, Art. 7, right to personal liberty, Art. 8, right to fair trial and Art. 9, principle of legality.[469]

We may mention the complicated case of the Panecho Tineo family against Bolivia. The family having Peruvian citizenship entered the country in 1995 claiming for refugee status at the Centrum for Involuntary migration. Both parents were previously in Peru tried for supposed crimes of terrorism, during which they were proven to be victims of inhuman treatments. The details of the case in Peru were investigated by the IACtHR in the case of Miguel Castro Castro Prison against Peru. Year after their release they received an information that a further arrest warrant had been issued on them, which reasoned fleeing the country and entering Bolivia. The refugee status was granted them in Bolivia in 1995. Nevertheless, in 1998 the father Pacheco signed a sworn statement of voluntary repatriation before the Migration Center. The document stated, that the whole family will move back to Peru without any stop in another country, on the basis that no attention has been provided to their case since the start of 1998. However, interestingly, the issue of the decision has not been later proven. Nevertheless, the family have moved to Chile where they requested a refugee status, which was recognized both by Chile and the UNHCR regional office for Southern Latin America. However, the family has illegaly entered Bolivia again, in order to obtain documents regarding their university studies during time they spent there. In their time of visit to Bolivia, they claimed for documents enabling them to legally cross the borders to

[467] IACtHR, Vélez Loor v Panama, No. C. 218, Judgment, 23 November 2010, para. 196-205.
[468] Ibid, para. 206-208.
[469] Ibid, para. 327.

Chile at the Migration office. Here, they were arrested on grounds that they illegally crossed the borders of Bolivia. The national process regarding their issue was consistently performed without their presence and without the possibility to explain their situation. Even though the Chilean authorities started proper communication with Bolivia the decision to execute the expulsion was performed to Peru. The argumentation behind the decision were the national norms in force, which stated that irregular migrants has to be either returned to the country from which they enterd or to their country of origin. As both were Peruvian citizens they were handed over to Peru, which immediately detained them and started the investigation of the accusions of them being terrorists.[470]

The IACtHR in the present case stated, that the right to seek asylum does not mean that the status would be granted. Yet, it has to mean, that the authority will ensure a diligent and due process when investigating the case. Hence, in the present case Bolivia has violated various articles of the American Convention including the rights of judicial guarantees and the principle of non-refoulment. The Court furthermore elaborated, that the principle of non-refoulement carries a broader meaning and scope within the Inter-American system. This breadth is due to the complementarity between international refugee law and international human rights law, making the prohibition of refoulement a fundamental element of the international protection for refugees and those seeking asylum. This principle is reinforced within the inter-American system by recognizing the right to seek and receive asylum. As a result, such individuals cannot be turned away at the border or expelled without a thorough and individualized assessment of their asylum claims. Before expelling anyone, States must ensure that asylum seekers have access to adequate international protection through fair and efficient asylum procedures in the country to which they are being sent. Hence, the obligation to investigate the situation in the country of return stands irrespective of whether it is the pertinent persons' country of origin. Additionally, States are obliged not to return or deport any individual seeking asylum if there is a possibility of persecution or to a country from which they could be sent back to the country where they faced this risk.[471]

The IACtHR has in its later opinions presented the view, that in fact in situations of mass influx of persons the case-by-case analysis may be impracticable, yet the principle of non-refoulent including humane treatment has to be abided. Additionally, the Court stipulated that the principle may be understood as *ius cogens*, consequently the countries have the duty

[470] IACtHR, Pacheco Tine Family v Plurinational State of Bolivia, ACse No. 12/474, 25 November 2013.
[471] Ibid, para 151-199.

to implement measures for its guarantee.[472] As Giupponi states, the IACtHR's interpretation is in the matters of asylum law quaite consistent, which can be connected to the aim of removing any room for maoeuvre of national courts in the matter and at the same time to foster their active role in the building of the Inter-american human rights system.[473]

9.4. Perspective of other regions

African countries having vast amount of experiences with armed conflicts or totalitarian regimes has the highest number of people living under the status of internationally displaced or refugee. The stand of African countries towards asylum-seekers began to be a topic of discussion from the 1960's and early 1970's. As various countries gained independence from their colonial governments different regimes started to emerge in these countries. Many of them established dictatorial ruling notwithstanding any previous human rights efforts. Consequently, numerous people were looking for safety abroad.[474]

As the issue spread over the region the regional organization deemed it necessary to create a common ground. The fundamental standards for the asylum law in Africa were established with the adoption of the Convention Governing the Specific Aspects of Refugee Problems in Africa in 1969 by the Organization of African Unity. The Convention was understood as having actual provisions, which effectively grant rights and seek to address the conditions of refugees in the receiving state. The preamble of the Convention instantly refers to the influence which the decolonization had on the human rights in Africa. It sets that the treaty is aimed to expand the protection by the UN system, ie. 1951 Refugee Convention. The two most important provisions of the Convention are in Art.2, right to asylum and principle of non-refoulment. Although the Convention may broaden the Refugee Convention in some places, it has numerous issues. Paragraph 4 and 5 in Art. 1 constitute an obstacle to the effective implementation of the rights enshrined in the text, by setting exceptions from application of the convention to those who has seriously infringed its purposes.[475]

The right to asylum and non-refoulment is further declared in the African Charter in its Art. 12. The provision includes a general protection of those who are subject to persecution

[472] IACtHR, Advisory opinion C- 21/14 "Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, 19 August 2014.
[473] Giupponi, B.O. *Assessing the Evolution of the Inter-American Court of Human Rights in the Protection of Migrants' Right: Past, Present and Future*, The International Journal of Human Rights, Vol. 21, 2017, p.1493.
[474] Abass, A. And Mystris, D. The African Union Legal Framework for Protecting Asylum Seekers. In Ippolito,F. and Abbas, A.: *Regional Approaches to the Protection of Asylum Seekers*, Routledge, 2016, p. 19-20.
[475] OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 9.10. 1969; Murray, R. *Human Rights in Africa: From the OASU to the African Union*, Cambridge University Press, 2004, p. 189.

and they need to be protected from threats in their country of residence.[476] There are several cases connected to the violation of prohibition of torture incorporated in Art.5 of the African Charter and asylum-seekers. In the Organisation Mondiale Contre La Torture against Rwanda case the African Commission found that the conditions of Burundian refugee children, women and seniors are held as violating their psychical and mental intergrity and thus violating Art. 5. Additionally, in the present case the Commission found violation of the Art. 7, the right to be heard before a competent court as well as Art. 12(5), which prohibits the mass expulsion of foreigners.[477]

According to the UNHCR, the Asia-Pacific region is a home to the world's largest refugee populations. The regular movement of asylum-seekers is mainly consisted out of people coming from Myanmar, Afghanistan or Sri Lanka. Nonetheless, very few countries are party to the Refugee Convention, making in fact the refugee measures solely the discretion of states.[478] In the ASEAN system, refugees are mentioned within the APSC Blueprint in the contect of post-conflict peace building, in which refugees are observed as victims of the conflict. However, there is no reference to the principle of non-refoulment. [479] We may mention Art. 15 and Art. 16 of the ASEAN Human Rights Declaration. Art. 15 sets that every person has the right to freely move and reside within the country, including leaving this country. The further Art. 16 stipulates, that every person has the right to seek and receive asylum in accordance with the laws of the state. Hence, the articles more likely recognize refugees and asylum-seekers as persons with human rights, however does not express any obligation towards the countries of the region.[480]

Furthermore, UNHCR's research has presented that more than half the world's refugees live continuously in refugee camps in host countries, which have either no possibility or lack of will to grant them residency. These people, having already the status of refugees, have valid reason not to return to their home countries. These people live for years in various Asian countries fearing possible arbitrary refoulment.[481] As the refugee system is explicitly lacking the only steady treaty helping the non-refoulment and protection of human dignity of

[476] Ankumah, E.A. *The African Commission on Human and Peoples'Rights*, Martinus Nijhoff, 1996, p. 139.
[477] See African Commission on Human and Peoples' Rights, Organisation Mondiale Contre La Torture and Association Internationale des juristes Democrates, Commission Internationale des Juristes and Union Interafricaine des Droits de l'Homme v Rwanda, Communication No. 27/89; 46/91; 49/91; 99/93, 1996.
[478] UNHCR's Regional Update – Asia and Pacific, 63rd session, Geneva, 1 October 2012, para A.
[479] Kneebone, S. ASEAN and the Conceptualization of Refugee Protection, In Abass, A. and Ippolito, F.: *Regional Approaches to the Protection of Asylum Seekers*, Routlege, 2014, p. 306.
[480] ASEAN Human Rights Declaration, opened for signature on 8 august 1967, entered into force 19 November 2012.
[481] See UNHCR's Global Trends:Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Person, Divison of Programme Support and Management, 2010.

foreigners may be the UNCAT. The convention is one of the most recognized treaties, thus it is limiting the countries from sending people to places where they fear illicit treatment. We can mention one Asian example, China. As a state party to the UNCAT, China is bound by Article 3, which prohibits refoulement (expulsion, return, or extradition) to states where there is a substantial risk of torture. While China lacks specific national legislation explicitly prohibiting refoulement based on torture, no such cases have been widely reported in the media. However, China's Extradition Law (Article 8) incorporates this prohibition by mandating the rejection of extradition requests if the individual faces a risk of torture or inhumane treatment in the requesting state.[482]

The source of constant tensions in these regions are due to ongoing political shifts, armed conflicts and more regular natural disasters. The states in these parts of the world rarely act in coordination when it would be more than necessary. The collective responsibilities are practically non-existent. The lack of effective regional mechanisms, or even lack of any mechanisms in other parts of the world besides Europe and America's are questioning the effectivity and consequently the whole existence of general *ius cogens* nature of the prohibition of torture, connected strongly to the principle of non-refoulment.

9.5. Concluding remarks on asylum law

In year 2015 the influx of foreigners coming to EU made it out of the bearable proportions, causing the well-known migrant crisis. This led to the breakdown of numerous international agreements and bilateral treaties dealing with migration and refugee issues. Many countries decided to defend their borders on the legitimate exercise of their national sovereignty. Although, the human rights framework was affected heavily on the fact that some international deals fell through, the *ius cogens* does not know any grounds for derogation. The pressure that the countries had to bear was for years tremendous, [483] yet what is absolute has to be absolute and there are no possibilities to overrule.

The 1951 Refugee Convention was established to address the refugee crises resulting from II.WW, emphasizing the prohibition of refoulement and the right to assimilation. Its 1967 Protocol broadened its scope by removing the geographical and temporal limitations that

[482] Zhe, L. P. China. In Roach, K.: *Comparative Counter-Terrorism Law*, Cambridge University Press, 2015, p. 598.

[483] Even though the author observes the migration crisis as something in the past, there are still waves of foreigners fleeing their country and coming to EU seen recently. Indeed, some experts claim that the crisis is still happening in 2025.

initially confined its application. These treaties are significant as they are the first international instruments to specifically outline the treatment of individuals forced to flee their homes due to conflicts within their country of origin. While the 1951 Convention does not explicitly state the right to asylum, it is implicitly included through the definition of refugees, non-refoulement protections, and outlined rights. Collectively, they establish the foundational principles for international refugee protection, legal status, and the rights and responsibilities of asylum seekers. While the Refugee Convention is the fundamental treaty establishing the protection, it excludes those individuals who are posing a threat to the country. On the contrary in the UNCAT (including the ECHR), the prohibition of non-refoulment is absolute. This entails that the protection against refoulement applies to every individual, regardless of their background, and no exceptional circumstances can justify any deviation from this prohibition.

Special duties arise from the general obligation to respect and ensure rights, tailored to the protection needs of individuals based on their personal circumstances. Undocumented migrants and asylum-seekers are particularly vulnerable, facing a higher risk of rights violations and lacking adequate safeguards. This vulnerability is rooted in historical and ideological contexts that vary by state, perpetuated by legal inequalities and structural disparities. While states can take action against migrants who violate laws, they must still uphold human rights and ensure equal protection regardless of legal status, nationality, race, or gender. International law establishes limits on migration policies, requiring adherence to due process, judicial protection, and respect for human dignity during expulsion or deportation proceedings. The right to non-refoulement applies to all migrants, not just refugees, when their life, integrity, or freedom is at risk, regardless of their legal status. Every host country has the duty to assess the general human rights situation in the possible refouler country, taking into account any imporvent or worsening which may be relevant in personal circumstances. If a foreigner claims they will face danger of illicit treatment if returned, the state must conduct an interview and preliminary assessment to evaluate the risk. This process should uphold minimum guarantees, allowing the individual to present reasons against expulsion, and if a danger is confirmed, they should not be returned to their country of origin or any country where that risk exists.[484]

[484] IACtHR, Nadege Dorzema et al. V Dominican Republic, Judgment, Case C. 251, 24 October 2012, para 152.

Conclusion

At the heart of the international human rights regime lies the categorical prohibition of torture, a norm enshrined in a comprehensive legislative framework composed of pivotal treaties such as the United Nations Convention Against Torture, alongside customary international law and regional human rights instruments. These sources collectively assert a universal repudiation of torture, highlighting its non-derogable status as a *ius cogens* norm. This designation underscores the prohibition's unyielding nature, demanding unwavering adherence from states and establishing a moral and legal obligation to prevent, prosecute, and eradicate such practices. The character of this prohibition is profoundly emblematic of the broader human rights mission to protect and preserve human dignity, serving as a cornerstone for the global commitment to uphold justice and accountability.

Yet, in reflecting upon the prohibition of torture, we encounter one of the most profound paradoxes within the sphere of human rights: a norm that is universally lauded yet unevenly adhered to. This discordance challenges us to consider the underlying structures that support or undermine human rights protections globally. The dynamics at play, extend beyond legal codification and delve into the realms of political will, cultural perception, and the broader socio-economic realities that shape state compliance and accountability. Thus, examining the prohibition of torture compels us to ask whether the current human rights framework is sufficient to foster genuine universality and effectiveness.

The research presented herein illustrates that, although the prohibition of torture initially appears to be an absolute and non-derogable right devoid of exceptions, states nonetheless find ways to exploit ambiguities in its definition to suit their own interests. Numerous binding international treaties that reinforce the prohibition often employ vague language regarding the obligations imposed, ostensibly paving the way for jurisprudence to adapt the rights in accordance with societal needs. Proponents of this flexibility may argue that the intention was to continuously expand the scope of the right. Conversely, skeptics may label this perspective as overly idealistic, asserting that the drafters, being States themselves, sought to create space for future interpretations that align with their own agendas. Nevertheless, there is a consensus among scholars that the abuse of such vagueness occurs

with alarming frequency, highlighting the ongoing challenges in the enforcement of the prohibition against torture.[485]

The lack of universal acceptance and recognition casts a shadow on the feasibility of the prohibition of torture as a truly universal standard. Even in jurisdictions that have ratified international treaties and conventions aimed at eradicating torture, the implementation of these norms often falls short. This situation begs the question of how we can reconcile the eloquence of legal texts with the harsh reality that torture persists, often under the guise of national security or counter-terrorism efforts. Ultimately, the exploration of the prohibition of torture compels us to delve into deeper ethical considerations regarding accountability, the role of the international community, and the integrity of human rights advocates. The ineffectiveness of existing frameworks raises critical inquiries about the commitment of global governance systems to uphold the dignity of every individual. Given this intricate interplay between law, practice, and morality, this dissertation aimed to scrutinize the current understanding of the prohibition of torture through a comparative analysis that underscores the need for a comprehensive and enforceable human rights regime.

The primary objective of this study was to analyze and compare the prohibition of torture across various legal and judicial frameworks, beginning with the universal protection of human rights and extending through the European, Inter-American, and African systems, concluding with a brief examination of other regions and their respective systems (if one may even refer to them as systems). The fundamental source for the definition of torture across the aforementioned systems is rooted in the UNCAT. As previously noted, the prohibition against torture is often articulated in vague terms within various treaty texts. It is evident that most treaties lack a clear definition, unlike the UNCAT. However, while the definition provided in the UNCAT is not without its shortcomings, it is unlikely that the majority of challenges stem directly from the definition itself. Legally, it is imperative for human rights standards to be supported by a legislative framework, nonetheless, without effective enforcement mechanisms, the text loses its inherent value. Consequently, the author concludes that the first set hypothesis, that the definition of torture as set forth and interpreted by the UNCAT contributes to confusion and allows for domestic interpretations that may undermine its fundamental purpose, holds some validity. However, it is essential to recognize that the root of the violations of the prohibition of torture is not primarily attributable to the UNCAT itself.

[485] See Kenny, P. D. *The Meaning of Torture*, Polity, Vol. 42/2, 2010; See Harper, J. *Defining Torture: Bridging the Gapy Between Rhetoric and Reality*, Santa Clara Law Review, Vol. 49/3, 2009; See Clucas, B. Johnstone, G. and Ward. T. *Torture: Moral Absolutes and Ambuguities*, Nomos, Baden-Baden, 2009.

Recognized as a *ius cogens* norm, the prohibition's character transcends legal formalism to embody a universal moral imperative, symbolizing a collective resolve to preserve the sanctity of human dignity across all cultures and jurisdictions. Through this prism, the prohibition underlines the broader commitment of the international community to uphold justice and human rights in an increasingly interconnected world. Nevertheless, upon careful consideration, it is imperative to question whether the prohibition of torture truly attains the status of *ius cogens*, or whether this classification remains more of an aspiration among scholars engaged in the analysis and drafting of international norms. According to the Vienna Convention on the Law of Treaties, *ius cogens* norms are those that are accepted and recognized by the international community as a whole, existing as peremptory norms that cannot be derogated from. This status necessitates that such norms be embedded within both international and national legislative frameworks on a universal level. However, several challenges promptly emerge. The definition of *ius cogens* demands universal recognition and acceptance. As demonstrated within this dissertation, numerous regions across the globe either fail to incorporate the prohibition of torture within their legal frameworks entirely or include it in documents that lack binding authority. For instance, the ASEAN human rights framework, which has yet to be ratified by signatories to attain binding status, exemplifies this issue. This situation raises critical concerns regarding the genuine universality and enforceability of the prohibition as a *ius cogens* norm, suggesting a gap between scholarly intent and practical implementation across diverse geopolitical landscapes.

Moreover, the definition of *ius cogens* requires not only widespread recognition but also universal acceptance. For instance, while the Islamic human rights framework does include the prohibition of torture within a binding treaty, the absence of mechanisms for individual complaints to the Arab Human Rights Committee and the non-operational status of the Arab Court of Human Rights highlight significant enforcement gaps. Human rights frameworks that generally function effectively, such as the Inter-American and European systems, also experience deficiencies, though in different forms. This dissertation highlighted issues concerning corporate accountability, demonstrating how powerful multinational corporations often establish operations in "grey zones," such as regions in Africa or Asia. Evidence indicates that in these areas, corporations frequently neglect their human rights commitments. National authorities in affected countries often find themselves powerless against such formidable entities. As a result, these companies frequently evade sanctions for human rights violations, even when there are clear links to illicit treatment. This underscores a global deficiency in enforcement mechanisms when dealing with corporate entities,

suggesting that the prohibition of torture is neither universally recognized nor accepted as it ought to be. While violations do not inherently negate the necessity of these norms, given the immutable nature of human behavior and the fundamental need to establish rules, if *ius cogens* is to be truly universally recognized and accepted, the prohibition of torture, as it stands, fails to meet this criterion. Consequently, the second hypothesis is confirmed, indicating that without more comprehensive and effective enforcement mechanisms, the purported universality of such norms remains an unfulfilled aspiration.

To further bolster the argument, we must consider the issue of the divergent interpretations of what constitutes illicit treatment. Throughout this work, it has been noted that even nations perceived as democratic and committed to human rights obligations sometimes attempt to stretch or manipulate the definition of torture to suit their own agendas. The post-2001 shift, following the infamous terrorist attacks, illustrates that what is considered non-derogable can be swayed by interpretations of the definition itself. National authorities have, at times, redefined the concept through certain memoranda. Fear is an extremely powerfull tool, thus authorities prioritized the aspect of national security over the established understanding of illicit treatment. Even some scholars have defended such measures. However, the nature of a peremptory norm strictly prohibits arbitrary reinterpretations, allowing neither reservations nor derogations, and can only be modified by another norm of equivalent status. Memoranda and similar documents certainly fail to meet these stringent criteria. Thus, it is pertinent to assert that when the prohibition of torture is subject to the discretion of its interpreters, it cannot satisfy the requirements of a *ius cogens* norm. This illustrates a fundamental challenge in maintaining the integrity and consistency of such a crucial international standard, besides validating the second hypothesis of the work.

During the research, the author observed that the diverse frameworks frequently drew upon the European legal paradigm, particularly through references to the case law of the ECtHR and, at times, to the ECHR itself. This reliance can be attributed to the relatively broad scope of application of the prohibition within the European region, complemented by the enforceability of ECtHR judgments. Consequently, the author acknowledges the merit of the European human rights framework in striving to achieve the highest standards of human rights protection globally.

However, the author contends that interpretations of the prohibition within this region, particularly by the ECtHR, are taking unpredictable turns that could yield contrary outcomes. Some of these interpretations, as evidenced in the case law of the ECtHR, warrant scrutiny. For example, in the Gägfen case, the Court, while attempting to assert the absolute nature of

the prohibition, suggested that there could be no justification for violating Article 3 of the ECHR. Firstly, the judgment subsumed the threat of torture under the prohibition, further asserting that such threats, regardless of their potential implications for the lives of many individuals, are impermissible. It is clear, that the right to life does not hold the same status as the *ius cogens* norm, rendering it as "less" than the prohibition of torture. This prompts however a critical question: would such reasoning hold if a genuine threat were to manifest? Furthermore, as the scope of the prohibition continuously expands with similar interpretation, the core significance of the right may inadvertently become diluted and diminished.

In this sense, we may mention the Duarte Agostinho application, which attempted to expand the article even to an unexpected interpretation. The application claimed, that the climate anxiety of the vulnerable groups sufficies the threshold of Art. 3. Althought, the application was held inadmissible, one might stop to reflect whether the modern but “strange” application isn’t the result of the widening observed in the jurisprudence of the Court. Consequently, the author claims tha the third hypothesis, that European regional human rights framework attempts to fight the „current trends“ of reinterpretation, by widening the scope of the prohibition in the region is in fact true.

While the research elucidates the complexities surrounding the prohibition of torture, it also highlights the imperative for a renewed commitment to enforce this fundamental norm rigorously. The existence of varying interpretations and the opportunistic redefinition of torture, rooted in political agendas, threaten to undermine the very fabric of human rights protections. To safeguard the integrity of the prohibition against torture, the international community must prioritize the establishment of a strong enforcement mechanisms that are both effective and adaptable. This may involve renewed international cooperation aimed at harmonizing standards and fully integrating the prohibition into national legal systems, ensuring that it is unequivocally recognized and implemented.

Furthermore, it is crucial to engage in a comprehensive dialogue with state parties to the various human rights treaties, fostering a collective understanding of the inviolable nature of the prohibition. Such initiatives can serve to bridge the gap between normative discourse and practical application, reinforcing the idea that human rights are universal and must be upheld without exception. The challenges faced in achieving true universality can be mitigated through cross-regional collaborations, exchanges of best practices, and capacity-building efforts aimed at strengthening judicial systems. This approach can help empower national courts to hold violators accountable effectively and mitigate the influence of powerful actors seeking to evade scrutiny.

Additionally, the interplay between human rights and corporate accountability must be a focal point of future research and advocacy. The troubling trend of multinational corporations operating usually in third world countries coupled with the inability of local authorities to challenge these entities effectively, underscores the need for an international framework that addresses corporate complicity in human rights abuses. This includes establishing clear guidelines and mechanisms that can hold corporations accountable when they violate human rights, thereby reinforcing the prohibition of torture and related abuses in practice.

As we look to the future, it is also vital to remain vigilant against the ever-evolving landscape of human rights challenges. The emergence of new threats, such as those posed by advances in technology and the rise of authoritarian governance structures, accentuates the necessity for continual adaptation and reaffirmation of the principles underpinning the prohibition of torture. It is essential that scholars, practitioners, and activists remain engaged in thoughtfully grappling with these ongoing issues, ensuring that the principle of non-torture remains not only a theoretical ideal but a practical reality.

In conclusion, the journey toward realizing the full potential of the prohibition against torture is fraught with complexities, but it remains an essential endeavor. The findings of this dissertation reinforce the notion that the prohibition, while formally recognized as a *ius cogens* norm, requires a powerful and unwavering commitment from both states and civil society to be genuinely universal. The pathway forward hinges on collaborative efforts to eradicate the ambiguities that allow for abuse and reinterpretation while reestablishing the core significance of this fundamental human rights principle. Only through concerted international efforts can we hope to ensure that the prohibition of torture is firmly anchored in both law and practice, thereby affirming our collective commitment to uphold human dignity in an increasingly complex world.

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